Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOSEPH H. NORWOOD, individually and as representative of a class of citizens;

Respondent,

v.

W.C. BAIN, JR. individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; and CITY OF SPARTANBURG,

Petitioners.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David L. Morrison - Counsel of Record
William H. Davidson, II
Andrew F. Lindemann
DAVIDSON, MORRISON AND LINDEMANN, P.A.
1712 St. Julian Place, First Floor
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR PETITIONERS

2218

QUESTIONS PRESENTED FOR REVIEW

I. Whether the searches of motorcycle saddlebags and unworn clothing that are conducted in response to a real and substantial threat to the public safety fall within the "special needs" exception to the warrant requirement.

II. Whether the chief policymaker who directed the searches of motorcycle saddlebags and unworn clothing is entitled to qualified immunity where there was no case law in existence holding that the searches were unconstitutional and where distinguished judges cannot even agree as to the unconstitutionality of those searches.

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District Court Order is Unpublished.

STATEMENT OF JURISDICTIONAL BASIS

A three-judge panel of the Fourth Circuit Court of Appeals issued its 2-1 decision on May 13, 1998. A petition for rehearing was subsequently filed with a suggestion for rehearing *en banc*. That petition was granted. The *en banc* court issued its decision on January 8, 1999.

The United States Supreme Court has jurisdiction of this appeal pursuant to the provisions of 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

The Respondent, Joseph H. Norwood, individually and as a class representative, commenced an action pursuant to 42 U.S.C. § 1983 against the Petitioners, W.C. Bain, Jr. and the City of Spartanburg, alleging the violation of their First and Fourth Amendment rights. In this action, Norwood challenges the constitutionality of various security measures taken by the Spartanburg Department of Public Safety at an American Red Cross sponsored motorcycle rally occurring on September 11, 1994, at the Piedmont Interstate Fairgrounds in Spartanburg, South Carolina.

In May 1994, organizers began preparations for the motorcycle rally scheduled for that September. The Spartanburg Department of Public Safety was requested to assist with security for the event. In the months leading up to the rally, the City, together with the South Carolina Law Enforcement Division (SLED), developed certain intelligence information that indicated the real possibility of an armed confrontation between rival motorcycle gangs at the rally. In particular, it was learned that the Hell's Angels and the Pagans were considering attending the rally. These rival gangs were at that time engaged in a

territorial conflict in South Carolina, and there were previous altercations between these gangs during prior months.

In late August or early September, it was learned from a Virginia State Police intelligence report that the Pagans had ordered a mandatory run to an undisclosed location for Saturday, September 10, 1994, the day before the rally in Spartanburg. The City also received information through SLED that the Hell's Angels would be attending a rally in Cherokee, North Carolina on the same weekend as the Spartanburg rally, and would be attending the Spartanburg rally after leaving North Carolina. Finally, on the evening before the rally, an event organizer advised Chief Bain that 3,000 to 4,000 bikers from the Cherokee rally would be attending the Spartanburg rally.

On the day of the rally, a checkpoint was set up at the gates to the fairgrounds entrance where the motorcycles would enter the fairgrounds. The purpose of the checkpoint was to prevent weapons from entering the fairgrounds. At the checkpoint, the officers examined and videotaped the drivers licenses of the persons entering by motorcycle. In addition, their motorcycle saddlebags and unworn clothing were searched for weapons. The original plan called for the use of hand-held magnetometers to conduct the searches; however, that method proved to be ineffective as a result of the metal on the

motorcycles. As a result, the saddlebags and unworn clothing were visually inspected by the officers. The officers did not conduct searches of worn clothing or search the individuals themselves. The searches lasted no more than one to two minutes. After the search procedures, the bikers were permitted to enter the fairgrounds. The officers were at all times polite and professional.

The checkpoint was visible to those approaching the fairgrounds. In addition, the persons on motorcycles were informed that they could park in an adjoining lot and walk into the fairgrounds without being stopped at the checkpoint.

The Respondent Norwood, on behalf of the class, contends that the inspection of the saddlebags and unworn clothing constituted an unreasonable search in violation of the Fourth Amendment. That issue and others were tried before a jury, but the jury was unable to reach a verdict. The parties agreed to allow the district judge to decide the case on the evidentiary record presented to the jury. The district court found that certain security measures including the videotaping procedure were constitutional, but the court determined that the searches of the saddlebags and unworn clothing was unreasonable due to the lack of individualized reasonable suspicion to conduct the searches. The

district court found that no damages had been proven and declined to award even nominal damages.[1]

The parties filed cross-appeals to the Fourth Circuit Court of Appeals.[2] By a 2-1 vote, the three-judge panel affirmed the decisions of district court, except that the panel ordered the district court to award nominal damages up to one dollar for the Fourth Amendment violation. Like the district court, the three-judge panel denied Chief Bain's qualified immunity defense. Judge Wilkins filed a dissenting opinion on the search and qualified immunity issues.

Bain and the City subsequently filed a petition for rehearing and a suggestion for rehearing *en banc*, which were granted. Argument was held before the *en banc* court consisting of fourteen appellate judges. On January 8, 1999, a decision was issued whereby the court split 7-7 on the search issue and on the qualified immunity issue. As a result, the judgment of the district court was affirmed with respect to those issues.

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[1] The district court had jurisdiction of this action pursuant to the provisions of 28 U.S.C. § 1343.

[2] On August 14, 1996, the Respondent Norwood filed his notice of appeal to the Fourth Circuit Court of Appeals. The Petitioners filed their cross-appeal on August 22, 1996. The Fourth Circuit Court of Appeals exercised jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

ARGUMENTS

I. The search of the saddlebags and unworn clothing conducted as a result of a grave threat to the public safety falls within the "special needs" exception to the warrant requirement.

By the vote of an equally divided *en banc* court, the Fourth Circuit Court of Appeals concluded that the search of saddlebags and unworn clothing prior to entrance to a motorcycle rally, in spite of reliable information that an armed confrontation by rival motorcycle gangs was planned, was in violation of the Fourth Amendment prohibition of unreasonable searches. The Fourth Circuit ruled that the suspicionless search of the bikers' property under the prevailing circumstances did not fall within the "special needs" exception to the warrant requirement. That decision is worthy of review by the United States Supreme Court for several compelling reasons.

First, as will be discussed in more detail below, the Fourth Circuit failed to follow the reasoning of existing decisional law by this Court which would logically extend the "special needs" exception to the facts of this case. Second, the Fourth Circuit decision will tremendously burden the ability of law enforcement to react to grave matters of public safety. Third, there is absolutely no authority in any circuit that presently addresses the extent to which law enforcement

may go when faced with a legitimate threat of harm to a large number of the general public. This alone is an issue that is deserving of this Court's attention given its repercussions in a society that is becoming more violent and more unpredictable and a society more susceptible to acts of terrorism that threaten the safety of large numbers of people. Finally, this is an issue which requires a resolution by this Court in light of the obvious uncertainty it creates, as evidenced by the lack of a consensus in the Fourth Circuit and the diametrically opposite conclusions drawn by the judges of that court.

The well-reasoned dissent by Judge Wilkins explains best the reasons that this Court needs to grant certiorari in this case. At the very beginning of his dissent, which was joined by six other judges of the evenly divided court, Judge Wilkins writes:

> A conclusion that law enforcement officers cannot, consistent with the Fourth Amendment, attempt to avert a concrete threat of great public harm with a relatively unobtrusive and appropriately effective warrantless search not supported by individualized suspicion and not undertaken for law enforcement purposes creates an unnecessary risk to public safety and is directly contrary to Supreme Court precedent.

As Judge Wilkins aptly notes, certiorari is warranted because of the unnecessary risk to public safety created by the Fourth Circuit decision, a precedent that will impede the efforts of law enforcement

not only within the Fourth Circuit but in all other circuits as well, given the lack of case law in those circuits addressing this issue.

Likewise, Judge Wilkins correctly states that the Fourth Circuit decision is "directly contrary to Supreme Court precedent" which has previously addressed the "special needs" exception in other contexts. It is well settled that a reasonable search must typically be predicated upon probable cause or the lesser standard of reasonable suspicion. However, "neither a warrant nor probable cause, nor indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). In fact, this Court has repeatedly recognized exceptions to the requirement of reasonable suspicion where compelled by "special needs, beyond the normal need for law enforcement." *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 , 619 (1989). The "special needs" have been described as "concerns other than crime detection." *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

In *Skinner*, this Court held:

> In limited circumstances, where the privacy interest implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search

> may be reasonable despite the absence of such suspicion.

Skinner, 489 U.S. at 624. A grave threat to the public safety, consistent with the facts of the present case, constitutes such "an important government interest." In fact, in *Chandler*, *supra*, this Court reasoned that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' -- for example, searches now routine at airports and at entrances to courts and other official buildings." 520 U.S. at 323.

Therefore, in its latest decision to address the "special needs" exception, this Court makes it abundantly clear that the unconstitutionality of the Georgia statute at issue is readily distinguishable from cases where the public safety is in significant jeopardy. The Court even cites to the analogous situations of airport and courthouse searches, even though those examples are not nearly as compelling as the facts of the present case, where a real and definite threat was eminent. The need for a suspicionless search here qualifies as a "special need"; the need went far beyond ordinary crime detection or investigation. The need was the prevention of weapons from entering the fairgrounds, a reasonable response designed to prevent a violent confrontation between rival motorcycle gangs and to safeguard the public.

"When such 'special needs' -- concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314. In his dissent, Judge Wilkins concisely yet eloquently applies the three-prong balancing test to the facts of this case.

Without question, Chief Bain and the City were faced with reliable and substantial intelligence information indicating that an armed confrontation between the Hell's Angels and Pagans was a likely occurrence at a public charitable event to be attended by unsuspecting adults and children. As Judge Wilkins concluded:

> [U]nder the circumstances presented here, a special governmental interest existed in protecting the public. Spartanburg possessed concrete information that armed, rival motorcycle gangs, the members of which could not be identified, planned to attend the rally. And, the potential for the eruption of violence appeared real in light of past altercations between the two groups. Given the large number of participants expected for the rally and the potential for a massive, violent confrontation, Spartanburg clearly possessed a genuine and substantial need to safeguard the public.

Hence, the first prong of the analysis is satisfied, but the analysis does not stop there. It is necessary to also assess the effectiveness of the intrusion (i.e., the search of the saddlebags and

unworn clothing) and the magnitude of that intrusion. *See*, *Michigan Dep't. of State Police v. Sitz*, 496 U.S. 444, 455 (1990). The Petitioners understood through intelligence and training that the motorcycle gang members would carry their weapons in their saddle bags and that they would not separate from their motorcycles. Based on this information, the Petitioners directed their efforts at the bikers who sought to take their motorcycles into the fairgrounds rather than those who parked their motorcycles outside and entered on foot. The search procedures were developed to be the most direct and efficacious method to accomplish the goal of keeping weapons out of the fairgrounds. The plan initially was to use hand-held magnetometers to conduct the searches, a method found permissible in the one reported decision having a similar factual setting. *See*, *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987). That original plan proved ineffective given the metal on the motorcycles. As a result, the manual search procedures were justified and were effective in accomplishing the Petitioners' goal in light of the intelligence information that was guiding their decision-making.

Likewise, the degree of the intrusion, particularly in light of the significant governmental interest, was minimal at best. The searches were brief in duration. The officers were polite, pleasant and

professional, as evidenced by the videotapes submitted into evidence. The officers were not called upon to exercise any discretion; the searches were conducted with regularity and neutrality. Moreover, a reasonable alternative existed. The bikers were not compelled to have their saddlebags searched; they were given the option of parking their motorcycles in a lot located outside the fairgrounds and entering the fairgrounds on foot.

Judge Wilkins summarized the application of the balancing test to the facts of this case:

> In sum, a genuine and substantial threat to public safety existed that created a special need beyond that of the traditional law enforcement goals of apprehension and detection of criminal conduct; the method chosen to address that need effectively advanced the public interest, which could not have been promoted as well by a scheme requiring individualized suspicion or a warrant; and the intrusion suffered by those individuals who submitted to the search was minimal. Therefore, a balancing of these factors clearly demonstrates that the search conducted was reasonable and thus not violative of the Fourth Amendment.

The district court and the evenly divided Fourth Circuit erred in failing to extend the "special needs" exception to a substantial and grave matter of public safety, an area foreseen by this Court in *Chandler*, *supra*, as a logical extension of the "special needs" exception. In fact, the Petitioners submit that circumstances such as

those present here constitute a more worthy "special need" than the drug testing and the school searches and the sobriety checkpoints where the exception has been applied previously with this Court's approval.

Clearly, this Court needs to intervene in this debate to address what action law enforcement may take when faced with a legitimate public safety crisis where the facts do not easily give rise to individualized reasonable suspicion. These situations will arise again, probably more frequently than anyone cares to believe. As the Oklahoma City and the World Trade Center bombings have ably demonstrated, terrorism and other forms of mass violence do occur in the United States. The extension of the "special needs" exception to situations such as what was facing Chief Bain and the City is necessary to allow for the protection of the public. When a search is designed to effectively address a threat to the public safety and does so in a minimally intrusive manner, that search should be held constitutional. To hold otherwise places our law enforcement in the untenable position of being unable to defend against a known threat of grave harm, and it places the general public unnecessarily in that harm's way.

II. W.C. Bain, Jr. is entitled to qualified immunity in that the law governing his actions was not clearly established.

The evenly divided Fourth Circuit Court of Appeals affirmed the district court's denial of qualified immunity for Chief Bain. In so ruling, the Fourth Circuit concluded that a "survey of the legal landscape" that existed in September 1994 clearly reflected that the search procedures implemented by Bain were in violation of the Fourth Amendment.

The error of the Fourth Circuit's ruling is two-fold. First, the "survey of the legal landscape" in September 1994 did not include any case law even remotely on point. The closest case was the Second Circuit decision in *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987), which involved pat-down searches of persons entering a Ku Klux Klan rally. The Second Circuit ruled the pat-down searches to be unconstitutional; however, the court did "allow magnetometer searches of persons and packages at such rallies, followed by frisks where the magnetometer indicates the presence of metal and the situation cannot be resolved by use of the magnetometer alone." 832 F.2d at 1340. The Second Circuit further recognized that "more intrusive measures might

be justified by future events." 832 F.2d at 1341.[3] In the present case, the Petitioners attempted to use hand-held magnetometers to conduct the searches for weapons, but this proved ineffective given the metal of the motorcycles. As a result, an alternative plan was implemented on the scene by conducting minimally intrusive visual inspections of unworn clothing and saddle bags.[4]

The remaining cases cited by the Fourth Circuit as inclusive of the "survey" are cases where the threat to the public safety paled in comparison to the scenario facing Bain and the City. The cases involving searches for alcohol and drugs at sporting events and rock concerts did not clearly establish precedence for what the City was undertaking.[5] It was with this backdrop -- unusual circumstances giving

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[3] It is noteworthy that the Second Circuit in *Wilkinson*, *supra*, ruled that the individual defendants were entitled to qualified immunity.

[4] Significantly, in rejecting Bain's claim of qualified immunity, the Fourth Circuit explained that "Bain's decision was one taken after unhurried deliberation and with ample opportunity for reflection and counsel." That is not entirely accurate with respect to the searches of clothing and saddlebags. The original plan to use magnetometers proved ineffective, and alternative measures were implemented in response. Those alternative measures were not the result of unhurried deliberation.

[5] It should be noted that the stadium cases cited by the Fourth Circuit involved physical searches of persons for drugs or alcohol. In the present case, the searches were limited to unworn

rise to a grave threat to public safety and the lack of clear authority to govern the City's response -- that Chief Bain implemented the search procedures at issue. That scenario warrants qualified immunity for Bain.

Secondly, the Fourth Circuit failed to apply a truly significant and insightful point of law that was observed by Judge Wilkins in his original dissent. In evaluating Bain's entitlement to qualified immunity, this Court should take notice of the obvious difference of opinion among the distinguished judges that have considered the reasonableness of Bain's actions. With the opportunity to assess the situation after the events have unfolded, seven judges of the Fourth Circuit Court of Appeals concluded that the searches of clothing and saddlebags were unreasonable. Seven other judges, however, reached the opposite conclusion and found the search procedures were reasonable. There can be no better evidence that the law that governed Bain's actions was not "clearly established."

If two jurists (or better yet, fourteen jurists) cannot agree on whether the Fourth Amendment was violated in this case, then obviously no "bright line" was transgressed. The concept of qualified

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clothing and saddlebags and for the purpose of detecting weapons, making the searches much less intrusive.

immunity recognizes that it is patently unfair to hold a governmental official liable for monetary damages for violating law that is not clearly established. As the various opinions authored by the Fourth Circuit judges ably demonstrate, the unconstitutionality of Bain's actions relative to the search procedures was not clearly established, and as such, Bain is undoubtedly entitled to qualified immunity.

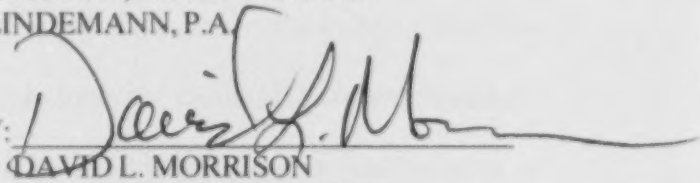
The Petitioners are unaware of any Supreme Court case that sets forth the basic rule that the law cannot be deemed "clearly established" where the reviewing judges, trained and skilled in constitutional law, cannot agree as to whether particular conduct is unconstitutional. In those circumstances, the governmental official under scrutiny is deserving of qualified immunity. No other result would be fair or reasonable. This case gives this Court an excellent forum to state that rule of law, a rule which will receive, in the Petitioners' judgment, frequent application and which will further refine the concept of qualified immunity, thereby upholding the important policy considerations that underlie that defense.

CONCLUSION

Based on the foregoing discussion and analysis, the Petitioners, W.C. Bain, Jr. and the City of Spartanburg, respectfully request that this Court issue a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals with respect to the questions presented herein for review.

Respectfully submitted,

DAVIDSON, MORRISON AND LINDEMANN, P.A.

BY: 

DAVID L. MORRISON
WILLIAM H. DAVIDSON, II
ANDREW F. LINDEMANN
JAMES M. DAVIS, JR.
1712 St. Julian Place
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR PETITIONERS

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APPENDIX

David L. Morrison - Counsel of Record
William H. Davidson, II
Andrew F. Lindemann
DAVIDSON, MORRISON AND LINDEMANN, P.A.
1712 St. Julian Place, First Floor
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR PETITIONERS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

JUL 16 1996
LARRY W. PROPES, CLERK
U. S. DISTRICT COURT

Joseph H. Norwood, individually and as a Representative of a class of Citizens,	)	Civil Action No. 7:95-1016-3
Plaintiff,	)	
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
W.C. Bain, Jr. individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department and the City of Spartanburg,	)	
Defendants.	)	

The Plaintiff and the class members he represents were involved in a Red Cross fund raising motorcycle rally held on September 11, 1994. Plaintiffs brought suit alleging that their Fourth Amendment rights were violated due to the alleged search, seizure, videotaping, and license check conducted by the Defendants as the class members entered the Piedmont Interstate Fairgrounds. The Plaintiffs also alleged that their First Amendment rights to associate were violated by the Defendants' actions.

During the week of May 20, 1996, this matter was presented to a jury. After fourteen hours of deliberation, the jurors were hopelessly deadlocked. Both sides have agreed to waive their rights to another jury trial. This Court, based on the express stipulation of the parties, now decides the action.

During trial, the Court directed verdict against Plaintiffs on their First Amendment claims. This Court also directed verdict against Plaintiffs on their claims for punitive damages. Those rulings stand. This Court now announces its findings of fact and conclusions of law regarding the remaining claims.

FINDINGS OF FACT

1. The Spartanburg Police Department (hereinafter the "Department"), headed by W.C. Bain, Jr. (hereinafter "Bain"), became involved in the Red Cross Poker Run (hereinafter "Rally") in May, 1994, when the Department was contacted to assist in providing security at the Piedmont Interstate Fairgrounds (hereinafter "Fairgrounds"). The Department was asked by rally organizers to provide off-duty officers.

2. John Poole, one of the co-chairs of the event, approached Captain Doug Horton of the Department sometime after the initial request for assistance at the Rally and advised Horton to check on an individual named James "Oats" Oatfield, who was a reputed member of the Hell's Angels and A.B.A.T.E., which stands for "A Brotherhood Against Totalitarian Enactments". Poole also asked Horton to check on an outlaw biker group known as the Pagans.

3. Horton then approached a reserve officer of the Department, Carl McKinney, who reported that he had information that there was going to be a confrontation between rival biker gangs at the Rally. McKinney told Horton that his friend had been involved in a biker gang and was concerned for McKinney's safety. This friend also told McKinney that some of the persons involved were called "Penguin Poppers". McKinney testified that his friend asked to remain anonymous, as McKinney's friend was also concerned for

his safety. McKinney further testified that his friend indicated that the biker gangs would be unidentifiable at the Rally because the members were going to "drop their colors". To "drop colors" means to conceal one's gang affiliation. "Colors" are the emblems and mode of dress that identify certain members of biker gangs. The "colors" of a gang member are consider sacred by members of the gang.

4. Horton contacted Lennie Hicks at the South Carolina Criminal Justice Academy. Hicks had taught a course on outlaw biker gangs to officers at the academy. Hicks no longer taught the course on outlaw biker gangs and referred Horton to Lt. Ron Cook of SLED. Cook was the law enforcement expert on intelligence relating to biker gangs. Horton called Cook and described the information he had.

5. Cook informed Horton that James "Oats" Oatfield is one of the oldest living Hell's Angels in the country and was the state coordinator of ABATE. Cook also explained that the term "Penguin" is a derogatory term for Pagans used by the Hell's Angels. Cook further stated that the Hell's Angels and the Pagans were in turf battles over South Carolina. Based on these turf battles, the Hell's Angels and the Pagans enjoy tremendous animosity toward each other. Cook further told Horton that the term "Penguin Popper" is a designation of a rival biker gang whose aim is to cause harm to or death of a Pagan. The term "Penguin Popper" was not a commonly known term, thus lending some credibility to the reports Horton related. Cook added that a clash between the Pagans and the Hell's Angels could be a very volatile situation. According to Cook, there were a number of motorcycle gangs located throughout South Carolina and including the Spartanburg area. Members of these gangs were reported to be "Penguin Poppers" in order to become full

color-wearing members of the Hell's Angels.

6. Cook further informed Horton that there had been a fight between Hell's Angels and Pagans in Myrtle beach in May, 1994. During this fight, several gang members were hospitalized and the Hell's Angels had stripped a Pagan of his colors and shredded them. After this fight, during negotiations by SLED for the return of the colors, a Pagan leader warned law enforcement that there would be retribution against the Hell's Angels.

7. Cook also related to Horton that in the summer of 1994, the Hell's Angels and Pagans had another fight during a charity poker run similar to the Rally. Cook stated that this fight also ended in injury.

8. After speaking with Cook, Horton verified that there were active biker gangs in the Spartanburg area. The Spartanburg Sheriff's Department reported that many of these groups were under surveillance and asked Horton to forward any information Horton had on these gangs.

9. In early August, 1994, Horton informed Bain for the first time about the Rally scheduled to end at the Fairgrounds and the potential for violent confrontation. Bain was also informed of that a beer permit had been issued for the Rally. Bain was noticeably upset by these revelations. Bain then set a meeting to be held on August 24, 1994 to discuss public safety at the Rally.

10. On August 16, 1994 Poole and other members of the Rally planning committee met with Horton at City Hall. At this time, the committee expressed concern for safety to Horton.

11. On the morning of August 24, 1994, Bain met with Cook and Horton to discuss any new information on biker gangs. Bain then held the meeting for everyone involved in planning

the Rally. At this meeting, Bain informed everyone that he and his Department would be responsible for the security. Bain also asked for an update regarding the plans for the Rally. Poole updated the attendees on the status of the Rally.

12. Cook explained to the attendees the information he had regrading the Rally and biker gangs in general. Cook then asked everyone if they had had any contact with any known member of any outlaw biker gang. No one indicated that there was any contact with any outlaw bikers. After the general meeting recessed, however, Poole sought out Horton and Cook and advised those officers that Poole had spoken with James "Oats" Oatfield. Poole related that Oatfield was very interested in the Rally, and would not comment on the Hell's Angels plans regarding the Rally. Poole did not reveal this information in the general meeting, but waited until later because he was concerned that one of the members of the planning committee was a leader of ABATE.

13. Bain then organized a training session for his officers on biker gangs. Officers were informed about biker gangs and their violent propensity.

14. Cook also informed Bain that the most effective preventative measure against biker gang violence was a strong show of force. Based on this information, Bain began arranging for officers to work the Rally. Available officers were told that they would receive their assignments on the morning of the Rally.

15. In late August or early September, 1994, Cook learned from the Virginia State Police that the Pagans had ordered a mandatory for Saturday, September 10, 1994, the day before the Rally. A "mandatory run" is an order from a leader of a biker gang for the members to ride to a certain location. The destination is not disclosed prior to the run in order to avert

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unwanted surveillance. There was no direct evidence that the destination of any mandatory run was Spartanburg.

16. Cook learned that a large crowd, including Hell's Angels, were supposed to be going to a Cherokee bike rally and would return by way of the Rally on Sunday. Cook relayed this information to Horton by fax on September 6, 1994. Horton and Cook kept in daily contact during this time.

17. On the night before the Rally, Poole told Horton that the Rally organizers expected as many as 3,000 to 4,000 bikers from Cherokee to converge at the Rally. Poole expressed his concern for adequate Rally safety.

18. Based on the information of his officers and Cook, Bain assigned 75 officers to work the Rally. In addition, Bain requested, and received approval for, use of the SLED helicopter.

19. On the day of the Rally, Bain assigned his offers to their posts and disclosed the procedure he required. Bain instructed his officers to set up a check point at the "cattle gate" to the Fairground. Officers were instructed to let anyone walk through the gates. Those on motorcycles, however, were to be stopped, have their licenses examined, their licenses and persons videotaped, and their saddle bags and unworn clothing inspected for weapons. Bain's proffered reasons for the actions were to make a video record in case of trouble. Similarly, Bain positioned an officer atop the grandstand with a video camera. This officer was instructed to only video tape the crowd if trouble started.

20. Bain instructed his officers to scan the bikers' possession for weapons using a hand-held metal detector. Not surprisingly, the metal detectors were ineffective due to the metal in the motorcycle.

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21. The checkpoint was setup at the end of Bishop Street leading into the Fairgrounds and was, by all accounts visible for some distance. Participants were told that they could enter the Fairgrounds without passing through the checkpoint if the participant parked their motorcycle in the parking lot. The officers followed Bain's instructions regarding the checkpoint, videotaping, and searching. That is, there was a checkpoint established, Plaintiffs were stopped, asked for identification, and videotaped. Some of Plaintiffs' saddle bags and unworn clothing was searched.

22. Cook was stationed at the cattle gate in order to see if he could recognize any biker gang members.

23. Bain's decision was based on the information he received from various sources as well as a legitimate concern for the safety of the Rally participants.

24. Bain was acting as a policy making official of the City of Spartanburg, and therefore, his actions were those of the City.

25. The officers involved in the searching and videotaping procedures were at all times acting under color of state law.

26. Bain and his officers had no information respecting any individual Plaintiff who passed through he checkpoint indicating that that individual was armed or engaged in any unlawful conduct.

27. Bain made no attempt to get a warrant before implementing the checkpoint, search, and videotaping procedure.

CONCLUSIONS OF LAW

Plaintiffs alleged that the action of the Defendants constituted unlawful searches and

seizures. Specifically, Plaintiffs alleged that causing Plaintiffs to pass through a checkpoint, searching Plaintiffs' belongings, and videotaping Plaintiffs' persons and drivers' licenses constituted unlawful searches and seizures. Each will be discussed below.

I. Checkpoint

The first step in Fourth Amendment analysis is to determine if there has been a search or a seizure. A search is the seeking out that which is otherwise concealed from view. A seizure of a person whenever the police act so to cause a reasonable person to feel that they were not free to leave. Terry v. Ohio, 392 U.S. 1 (1968). Similarly, a seizure occurs when a vehicle is stopped at a checkpoint. Michigan Department of State Police v. Sitz, 110 S.Ct. 2481 (1990).

Based on the facts presented, the Department seized the Plaintiffs. Simply because the government seized Plaintiffs does not mandate finding for the Plaintiffs. A seizure is lawful if it is reasonable. U.S. CONST. amend. IV. Certainly, a warrantless search c[illegible]eizure is presumptively unreasonable. Thus, the burden is on Bain to show that the seizure under these facts was reasonable. Bain has met his burden.

In order for the checkpoint to pass constitutional scrutiny, the state must have a legitimate interest, the checkpoint must promote that state interest advanced, and the checkpoint must be minimally intrusive. U.S. v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989). The ultimate issue of reasonableness is one of balancing the extent to which the seizure intrudes upon individual liberty against the advancement and importance of a state interest. Id.

The legitimate state interest sought to be advanced by Bain was to provide for the public safety of those citizens attending the event at the Fairgrounds by taking steps to minimize the possibility of a violent confrontation between rival outlaw motorcycle gangs.

The checkpoints, given the totality of the circumstances, were minimally intrusive. The checkpoints were clearly visible and the motorcyclists could avoid any questioning by parking their motorcycles and walking into the Fairgrounds. Similarly, pursuant to U.S. v. Ortiz, 95 S.Ct. 2585 (1975), the checkpoints minimized any fear and annoyance because all present could see exactly what was occurring in front of them. All who wanted to ride their motorcycles into the Fairgrounds were stopped. Thus, there was not impermissible singling out of any particular person.

Last, the checkpoint procedure was methodical and systematic in that the identification process was orderly and uniform; there were no more than two definite checkpoint lines; individuals were detained as briefly as possible; and officers were courteous and professional throughout. Accordingly, based on the specific facts here, the checkpoint was lawful.

2. Driver's License Check

As an adjunct to a legitimate traffic checkpoint, police may request an operator's permit for a motor vehicle. In this case, the police requested identification from the motorcyclists pursuant to the legitimate traffic checkpoint. Accordingly, the requesting of identification was lawful.

3. Videotaping

The first element of a search and seizure claim is that there must be a search or seizure. Plaintiff asserts that the videotaping of Plaintiff was an illegal search and seizure of the Plaintiff's identity. There was evidence that Bain videotaped the checkpoint procedures and information from the biker's licenses. There was no evidence of any other videotaping, even though a video camera was stationed on top of the grandstand in the Fairgrounds. Thus, the only videotaping at

(9)

issue here was adjunct to the checkpoint.

There can be no search of that which does not have a reasonable expectation of privacy. Those things exposed to public view do not have a reasonable expectation of privacy. See, Katz v. U.S., 389 U.S. 347 (1967). Thus, videotaping in public does not give rise to a cause of action when that videotape is not used for commercial purposes. There simply was no unlawful search or seizure regarding any videotaping activities of Bain.

4. **Search of Plaintiff's Closed Containers and Personal Items**

In addition to the checkpoint and videotaping, Bain also searched the closed containers and personal items of Plaintiffs. A warrantless search of a vehicle may be valid if based upon probable cause. California v. Acevedo, 500 U.S. 565 (1991). The requirement of probable cause exists even if the search occurs pursuant to a constitutionally valid check point. U.S. v. Ortiz, 95 S.Ct. 2585 (1975). The same standard of probable cause would apply to the searches of containers and persons at a roadblock.

There is no dispute that these searches were without a warrant and without individualized probable cause. Even if a search is not accompanied by probable cause or a warrant, consent of the person searched may make the search lawful. The consent of the person searched must be decided by looking at the totality of circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This Court has considered all of the circumstances here presented including the video tape of the actions of Bain, the method by which Plaintiffs were presented to Bain, and the number of police officers around at the time.

This Court finds that the searches of Plaintiffs violated the Fourth Amendment.

5. **Relief**

In a 42 U.S.C. § 1983 claim, a prevailing Plaintiff is entitled to damages or an injunction against future violations. A prevailing Plaintiff is entitled to actual, special, punitive or nominal damages. This Court directed a verdict against Plaintiff on its punitive damages claim at trial. That ruling stands. Similarly, Plaintiffs have presented no credible evidence that they suffered any actual or special damages. Thus, the only issue is nominal damages.

While Plaintiffs prevailed, this Court awards NO nominal damages. Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985) ("We conclude that once the issue is presented to the jury, it may decide to award a zero sum or some other small amount as nominal damages." Id. at 338).

As to the injunction, Bain is no longer the Chief of the Spartanburg Department of Public Safety. Similarly, the particular facts presented here make a repeat of this situation highly unlikely. For these reasons, this Court does not issue an injunction.

CONCLUSION

This Court finds that the videotaping, requesting of identification and stopping of Plaintiffs at a checkpoint did not violate the Constitution. This Court finds that the searching of Plaintiffs' persons and belongings violated the Fourth Amendment. This Court finds that while Plaintiffs prevailed, they are entitled to zero nominal damages.

G. Ross Anderson, Jr.
UNITED STATES DISTRICT JUDGE

Anderson, SC
July 16, 1996.

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOSEPH H. NORWOOD, individually and as representative of a class of citizens,

Plaintiff-Appellant,

v.

W. C. BAIN, JR., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; CITY OF SPARTANBURG,

Defendants-Appellees.

No. 96-2164

JOSEPH H. NORWOOD, individually and as representative of a class of citizens,

Plaintiff-Appellee,

v.

W. C. BAIN, JR., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; CITY OF SPARTANBURG,

Defendants-Appellants.

No. 96-2184

Appeals from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge.
(CA-95-1016-3-7)

Argued: June 5, 1997

Decided: May 13, 1998

Before WILKINS and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed in part, vacated and remanded in part by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Michael joined. Judge Wilkins wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: W. Gaston Fairey, FAIREY, PARISE & MILLS, P.A., Columbia, South Carolina, for Appellant. Andrew Frederick Lindemann, ELLIS, LAWHORNE, DAVIDSON & SIMS, P.A., Columbia, South Carolina, for Appellees. **ON BRIEF:** Rochelle R. McKim, FAIREY, PARISE & MILLS, P.A., Columbia, South Carolina, for Appellant. William H. Davidson, II, James M. Davis, Jr., ELLIS, LAWHORNE, DAVIDSON & SIMS, P.A., Columbia, South Carolina; H. Spencer King, III, Cathy Hoefer Dunn, LEATHERWOOD, WALKER, TODD & MANN, P.C., Spartanburg, South Carolina, for Appellees.

OPINION

PHILLIPS, Senior Circuit Judge:

Joseph H. Norwood, individually and as representative of a class, brought this § 1983 action challenging police conduct at a stop and search checkpoint set up at the entry to a charity motorcycle rally. The district court granted declaratory relief but declined to award damages on Norwood's Fourth Amendment claim stemming from the physical search of motorcycle riders' clothing and containers and upheld the temporary seizure of the riders at the stationary checkpoint. On the parties' cross-appeals, we affirm, except to the extent the district court failed to enter an award of nominal damages on the

class members' unlawful search claim. As to that, we vacate and remand with instructions to award nominal damages on that claim.

I.

The events giving rise to this action involve a charity motorcycle rally held for the benefit of the American Red Cross ("Red Cross") on September 11, 1994, at the Spartanburg, South Carolina fairgrounds. Sometime in May 1994, as the event's organizers were beginning plans for the motorcycle rally, representatives of the Red Cross and motorcycle clubs from various areas of northwestern South Carolina requested assistance from the Spartanburg Department of Public Safety ("SDPS") in maintaining order at the event. At a planning meeting, Captain Doug Horton of the SDPS was informed that organizers expected up to 3500 participants, possibly including members of two rival motorcycle gangs, the "Hell's Angels" and the "Pagans." After considering the matter, Horton believed that security for the event (which included a motorcycle ride to the fairgrounds followed by a motorcycle show and country music concert) could be provided by twelve to fifteen off-duty officers.

Following up, in July, Horton held a meeting of members of the SDPS's "reserve officers" force who on occasions provided off-duty security service for events. At the meeting, he told them of the possibility that motorcycle gang members might be attending the Rally and asked them to listen out for any information as to possible "problems." Following the meeting, one of the reserve force members, Carl McKinney, sought Horton out and advised him that an unidentified friend at work had told McKinney that an unidentified person had reported to McKinney's friend that a confrontation at the Rally between the Hell's Angel and Pagan gangs was planned. Horton was further advised that gang members could not be visually identified because it was planned that they would "drop their colors"—not wear identifying insignia.

Horton then sought specific advice on motorcycle gang behavior from others. A former police instructor on gang tactics referred him to Lt. Ron Cook of the South Carolina Law Enforcement Division (SLED), who was an expert on motorcycle gangs. Cook responded with information respecting the Hell's Angels and Pagans. Specifi-

cally, he advised that they were in an ongoing territorial struggle for "control" of South Carolina gang operations which was then claimed by the Hell's Angels but challenged by the Pagans. As a result, there had been two violent altercations between the groups in recent months, one in Myrtle Beach and one in New Jersey, both of which resulted in physical injuries. Lt. Cook also advised Horton that there were several local area motorcycle gangs affiliated with the Hell's Angels who might be inclined to intervene.

Armed with this information, Horton went in early August to SDPS Chief W.C. Bain and told him for the first time about the upcoming Rally and of the feared potential for trouble. Bain then called a general meeting of the Rally organizers for August 24 to consider the matter of security. Before the general meeting, Bain conferred with Horton and Cook and received from them an update on the situation as they understood it. At the general meeting, Cook repeated the information he had given Horton. Also, at the meeting, Chief Bain announced that the SDPS would take over and be responsible for security at the Rally and that the security measures would include some form of screening for weapons at the entrance to the Rally area.

To this end, Bain had a training session on motorcycle gang behavior patterns conducted for Department officers on September 1. At it, they were instructed on gang identifying marks and insignia and "weapons of choice." These weapons consisted, per the instruction given, of guns and a variety of blunt instruments such as heavy wrenches which were reportedly often carried in motorcycle "saddlebags." Following this session, Cook reported to Bain and Horton on September 6 that he had received information that members of the Hell's Angels would be attending the Rally and that the Pagans had been ordered to join in a ride to an undisclosed location on the day before the scheduled Rally.

Based on the information received, Chief Bain on September 6 directed that all available officers in his department be required to work on the day of the Rally and ultimately assigned 75 for specific security duty at the site. He also requested assistance from other law enforcement agencies, including members of SLED. SLED, on Lt. Cook's recommendation, approved use of one of its helicopters to aid in surveillance, but declined any further participation. According

to the testimony of SLED officials, they declined participation because of a determination that the potential for violence, according to their intelligence assessment, did not support a need for the size force otherwise assembled by Bain. Tr. Vol. 1, pp. 188-91. And, they specifically determined not to participate in the entry search procedure directed by Chief Bain, because of general doubts, based on their experience, of its need, and specifically because "due to the information that there would be a large number of family groups and regular civilians at this function, we just felt that our agency would not be involved in screening." Tr. Vol. 1, p. 139.

On the day of the rally, a single checkpoint was established on a public street outside the "cattle gate" entrance to the fairgrounds. The checkpoint was visible from a distance and persons on motorcycles were told that they could enter the fairgrounds on foot without passing through the checkpoint if they parked their motorcycles in the parking lot. Officers were instructed to allow anyone to walk freely through the gates.

Persons on motorcycles, however, were stopped, and had their licenses examined, their licenses and persons videotaped, and some had their motorcycle "saddlebags," or integral motorcycle compartments, or unworn clothing searched for weapons. The original plan had envisioned that physical searches of particular persons and their effects were to be conducted only after a hand-held metal detector (magnetometer) suggested the presence of a weapon in their clothing or on their motorcycles. The proximity of the metal on the motorcycles, however, soon made it apparent that the use of these devices was ineffectual for the purpose and they were abandoned in favor of physical searches of the interiors of saddlebags and unworn clothing. No consent to any of these searches was sought or given. Of the 107 members of the class, 74 had their motorcycle saddlebags, or integral compartments, or unworn clothing searched in this manner.[1] So far as

[1]As revealed by audio-videotapes made at the scene and introduced as evidence at trial, the procedure followed was this. Each motorcycle was stopped at the checkpoint. This sometimes led to long lines of motorcycles awaiting entry. At the checkpoint, all persons on each motorcycle, drivers and passengers alike, were required to provide photographic iden-

the record reveals, no weapons were detected at the checkpoint, nor was any member of either of the rival motorcycle gangs identified as such.

Norwood's class action complaint alleged that this conduct violated in various ways the Fourteenth and Fourth Amendment rights of class members and it sought injunctive and monetary relief against the City of Spartanburg and compensatory and punitive damages against Bain in his individual capacity. Specifically, the claim was that stopping the class members at the checkpoint and subjecting them there to extensive videotaping of their persons and licenses was an unreasonable seizure of their persons and that the ensuing physical inspection of the interiors of motorcycle saddlebags and integral compartments

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tification to an attending officer. Some had their identifications prepared for display as they reached the checkpoint.

Approximately thirty feet away a video camera operated by a law-enforcement officer filmed the activities. The officer on station took the proffered photographic identifications, confirmed that they resembled the holders and then handed them to the cameraman. The cameraman then held the identification up to the camera, read aloud the individual's name, address, and license number, and handed it back to the first officer.

Sometime during this process, a third and sometimes fourth officer conducted a physical search of some of the riders' motorcycle saddlebags, other closed compartments, and unworn clothing. Most persons stopped at the checkpoint were not wearing jackets but had placed them on the back-ends of their motorcycles. When that was the case, the officer would take the garment, reach inside the pockets, and conduct a physical search of its contents. Similar searches were made of the interiors of integral compartments and attached saddlebags of all motorcycles that had them. These searches were conducted by the officer having the rider open the compartment or saddlebag and then looking inside. In some cases, this involved taking articles out of the container, in others, feeling around inside the container.

At the conclusion of the search, each driver was allowed to enter the fairgrounds. The total process for each motorcycle lasted from one to two minutes. The officers were at all times polite and civil, wishing those stopped "a good day" as they entered the fairgrounds.

and the unworn clothing of members of the class was an unreasonable search of their property that violated their Fourth and Fourteenth Amendment rights.[2] Following discovery, the district court denied cross-motions for summary judgment. In doing so, the court rejected Bain's motion for summary judgment on grounds of qualified immunity and concluded that, as a matter of law, Bain was acting as the policy-making official for the City in planning and executing the checkpoint procedures challenged by the class.

The case then went to trial on the Fourth Amendment claims and the defenses raised by Bain and the City. When the jury was unable to reach a verdict, the parties agreed to allow decision by the court on the evidentiary record. The district court concluded that the initial seizure by stopping and videotaping the class members at the checkpoint was reasonable, and so did not violate their Fourteenth and Fourth Amendment rights. The court further concluded that the searches of motorcycle saddlebags and compartments and the riders' unworn clothing were unreasonable in light of the lack of individualized suspicion, and on this basis, gave a declaratory judgment of Fourth Amendment violation by these searches against both Bain and the City. Finding no evidence of actual damages, however, the court declined to award any monetary relief, including nominal damages, for that violation.

Both parties appealed. Norwood challenges the district court's holding that the checkpoint videotaping procedures did not violate class members' Fourth Amendment rights and the court's failure to award any monetary relief for the search violation that the court did find. The City and Bain challenge the district court's entry of declaratory relief on the Fourth Amendment search claim, contending that the court erred both in finding a violation and in concluding that the right violated was clearly established for purposes of Bain's qualified immunity defense.

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[2]In addition, the complaint alleged a First Amendment violation, claiming that the search and seizure was an infringement on associational and free-speech rights. The district court rejected this claim on summary judgment and that determination is not challenged in this appeal.

II.

We first address whether the checkpoint procedures other than the physical searches of unworn clothing and closed container interiors violated class members' Fourth Amendment rights. The district court held that they did not and we agree.

Persons stopped for any purpose at motorist "checkpoints" set up by government officials on public highways and streets have been seized for Fourth Amendment purposes. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). If the seizure is not reasonable, it violates the person's Fourth Amendment rights. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990) ("[Q]uestion [is] whether such seizures are 'reasonable' under the Fourth Amendment."). Whether particular checkpoint seizures are reasonable is determined by balancing the gravity of the public interest sought to be advanced and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped. *See Sitz*, 496 U.S. at 450-55 (confirming and applying balancing analysis as proper test of checkpoint seizures' constitutionality); *see also Brown v. Texas*, 443 U.S. 47, 50-51 (1979) (recognizing balancing analysis as proper test for constitutionality of all "seizures that are less 'intrusive' than a traditional arrest").

Applying this balancing analysis, the Supreme Court has upheld the constitutionality of government checkpoints set up to detect drunken drivers, *Sitz*, 496 U.S. at 444, and illegal immigrants, *Martinez-Fuerte*, 428 U.S. at 543, so long as they involve no more than an "initial stop . . . and the associated preliminary questioning and observation by checkpoint officers." *Sitz*, 496 U.S. at 450-51. In doing so, the Court has determined that the gravity of the public interests that such stops seek to advance and the general efficacy of checkpoint stops in advancing those interests outweigh the minimal intrusions on protected Fourth Amendment liberty interests that are caused by the brief stops required for such limited questioning and observation. But, the Court has also cautioned that "[d]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard." *Sitz*, 496 U.S. at 451 (citation omitted). And, applying these general principles, the Court

has recognized that an initially reasonable seizure may be transformed into an unreasonable one by further intrusions not based upon individualized suspicion or consent. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975).

In recognition of these established principles, Norwood has conceded for purposes of this case that the initial stops effected by this checkpoint, so long as they involved nothing more than the stops themselves and "preliminary questioning and observation by the checkpoint officers" respecting possible weapon possession, would have been reasonable seizures.[3] But, Norwood then contends that the further intrusion on privacy and personal security interests caused by the videotaping procedures made the initially reasonable seizures unreasonable.

The district court concluded—as Norwood has now conceded—that under the *Sitz* balancing analysis the initial stop for brief questioning and observation was reasonable in view of the gravity of the public interest and the minimal intrusion upon protected liberty interests such a seizure entailed. And, then addressing Norwood's contention that the videotaping took the intrusion over the line of initial reasonableness, the district court rejected it. In the court's view, because the class members had no reasonable expectation of personal privacy while in a public place, videotaping them at the checkpoint added nothing to the intrusion upon protected interests with which the *Sitz* balancing analysis is concerned. *See* JA 695 (order). While we think that view of the matter not an adequate one to meet Norwood's contention, we agree with the ultimate conclusion that the videotaping did not make what is conceded to have been a reasonable initial checkpoint seizure an unreasonable one.

Starting from his concession for purposes of the case that the initial

[3]In view of this concession, we need not address that possible issue. We observe, however, that the situation presented by the merely suspected threat of violence at a local event differs sufficiently from the documented risks of drunken driving on a state's highways and of illegal immigrant crossings of national borders to make the issue, though not necessarily its resolution, a significantly different one than those addressed in *Sitz* and *Martinez-Fuerte*.

stop for brief questioning and observation would have passed muster under established Fourth Amendment checkpoint jurisprudence, the question raised by Norwood is whether the videotaping procedure so increased this allowable intrusion as to tip the *Sitz*-test balance. And that, under the established principles, requires looking at both the objective and subjective aspects of this added intrusion. *See Sitz*, 496 U.S. at 451-52 (recognizing and applying both in assessing extent of intrusion at sobriety checkpoint).

The objective aspect concerns "the duration of the seizure and the intensity of the investigation." *See id.* at 452. Here, the record indicates that the entire seizure, including that part devoted to the videotaping procedure, lasted no more than a minute or two for any class member. That seems well within tolerable durational limits for any effective weapons checkpoint seizure. *Cf. id.* at 448 (characterizing 25 seconds for sobriety check seizure as "minimal".)

As to the intensity of this particular aspect of the checkpoint investigation, it actually added nothing to the intensity of that being conducted by the eyes and ears of the checkpoint officers; it merely provided a photographic record of what was being directly observed by those officers. *Cf. United States v. Espinoza*, 641 F.2d 153, 165-67 (4th Cir. 1981) (affirming admission of photographic evidence made at search scene where officers had legal right to view items). While we do not minimize the added degree of annoyance and resentment surely generated by this procedure, and indeed might question its actual utility for the asserted purpose of intercepting weapons and preventing violence, we nevertheless do not believe it added significantly to the intensity of the investigative procedures.

The subjective aspect of this particular intrusion concerns the degree of "fear and surprise" that it could generate in those subjected to it. *See Sitz*, 496 U.S. at 452-53. Here again, without minimizing the added degree of aggravation surely generated by this questionably relevant procedure, we do not believe it could possibly have generated the sort of "fear and surprise" with which the *Sitz* balancing analysis is concerned. The checkpoint was one clearly visible to and readily avoided without penalty by anyone approaching it; the videotaping was not done randomly so as to imply any special interest in particular persons stopped; and it was done in a civil manner that did not

involve any element of threat or force. *See Martinez-Fuerte*, 428 U.S. at 558-59.

Accordingly, though this videotaping procedure may well have pushed to the limit the kind of "brief questioning and observation" that may accompany valid checkpoint seizures without individualized suspicion, we conclude that under the circumstances it did not make unreasonable the checkpoint seizures whose reasonableness in other respects has been conceded for purposes of this case.

III.

We next consider whether the physical searches of the class members' clothing, saddlebags, and integral motorcycle compartments violated their Fourteenth and Fourth Amendment rights. The district court held that they did and we agree.

It is undisputed that these searches of the interiors of closed containers and clothing of motorists stopped at a checkpoint were made without consent, without warrants, and without probable cause (or any lesser form of individualized suspicion). Accordingly, it is axiomatic, and not actually disputed, that the searches violated the Fourteenth and Fourth Amendment rights of these motorcycle riders unless justified by some special circumstance recognized as creating an exception to the warrant and probable cause requirements. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (so holding as to vehicle search "conducted in the unfettered discretion of [law enforcement officials], who did not have a warrant, probable cause, or consent") (footnote omitted).

Bain and the City invoke two alternative grounds of justification for the searches: (1) that they were made incident to operation of a constitutionally valid checkpoint; or (2) that they were valid as "administrative searches" regulating access to a sensitive facility in order to prevent harm to those within. We take these in turn, and conclude that neither justified the searches.

A.

The fact that a warrantless, unconsented search of a motorist's effects is made at and incident to a valid non-border checkpoint sei-

zure is not, standing alone, a special circumstance allowing it to be made without probable cause. At least since the decision in *United States v. Ortiz*, 422 U.S. 891 (1975), it has been clear that the limited exception to the individualized suspicion requirement that justifies temporary seizures of motorists at properly operated checkpoints does not serve also to allow searches of the motorists' persons or effects. *Ortiz* flatly held that "at checkpoint stops removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." *Id.* at 896-97 (footnote omitted).

The City attempts to distinguish *Ortiz* on the basis that the checkpoint stops at issue in that case were discretionary ones that affected only three percent of passing vehicles, whereas those here affected all motorcycle riders seeking to pass beyond. The *Ortiz* Court, however, rejected just such an attempted distinction based upon the relatively greater regularity of a particular checkpoint's operation. In holding that such searches were just as unreasonable when made at a randomly-operated checkpoint as were those made by "roving patrols," the Court said that

> [t]he greater regularity attending the stop does not mitigate the invasion of privacy that a search entails. Nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the [authorities] search[ ] other cars as well.

Id. at 895.

Indeed, while the Supreme Court's motorist checkpoint decisions make plain that temporary seizures at regularized motorist checkpoints may be reasonable, none suggests that more extended seizures of the person, much less searches of the person or his effects may also be conducted without individualized suspicion as an incident of the checkpoint's operation. To the contrary, the Court's decisions have emphasized that to extend checkpoint seizures past the brief time required for "preliminary questioning and observation" or to conduct searches of those seized requires individualized probable cause to arrest or to search. *See Sitz*, 496 U.S. at 451 (holding that more extended seizure than that associated with initial sobriety checkpoint

stop "may require satisfaction of an individualized suspicion standard"); *Martinez-Fuerte*, 428 U.S. at 567 (holding that after brief questioning at illegal immigrant checkpoint, any further invasive conduct must "'be based on consent or probable cause'") (quoting *Brignoni-Ponce*, 422 U.S. at 882); *see also Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987) (applying above principles in finding indiscriminate pat-down searches of known Ku Klux Klan members entering rally site unconstitutional despite record of violent behavior at similar affairs).

We therefore conclude that the searches were not justified solely because conducted at and as an incident of a regularized checkpoint operation.

B.

Bain and the City principally rely for justification of these suspicionless searches by analogizing them to searches under the formal entry-search programs at airports and sensitive facilities such as courthouses that have been uniformly upheld by the lower federal courts.[4] *See e.g., United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972) (upholding airport search conducted under precursor to FAA blanket-search program, on modified *Terry*-analysis); *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974) (same; on fact-specific balancing analysis of reasonableness); *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972) (upholding courthouse-entry search conducted under GSA blanket search program on comparable reasonableness analysis); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (upholding airport search conducted under FAA's 1973 blanket search program as a form of "administrative screening search"). The contention is that

[4]The Supreme Court has not had occasion to address directly the constitutionality of such blanket area-entry searches, but recently has observed that blanket suspicionless searches, such as those "now routine . . . at entrances to courts and other official buildings" "may rank as 'reasonable'." *Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997).

State courts have also generally upheld these blanket search programs on the same basis as have the lower federal courts. *See, e.g., People v. Hyde*, 524 P.2d 830 (Cal. 1974).

the searches here were a comparable form of area-entry search at a sensitive facility that should be upheld on the same basis.

We disagree. The claimed analogy breaks down at every critical point in the proper Fourth Amendment analysis. Whether upholding the airport and courthouse search programs as a species of "administrative search" or under a straightforward fact-specific balancing inquiry into their "reasonableness," the courts have emphasized aspects of those programs that critically distinguish them from the sort of ad hoc localized search procedure employed here.[6]

Specifically, the courts have emphasized the following factors as critical, under a balancing analysis, to the constitutionality of the airport and courthouse searches. First, those searches were conducted

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[6]Though it is not directly relevant to our analysis, we observe that there is not a firm consensus as to the exact theory upon which area-entry blanket suspicionless searches may be justified. Some believe that "administrative search" theory as developed in the closely-regulated industry context, *see, e.g., United States v. Biswell*, 406 U.S. 311 (1972) (licensed gun dealer), is the only viable one since the *Terry*-justification theory cannot serve because of the lack of any degree of ingoing individualized suspicion. *See, e.g., Davis*, 482 F.2d at 907-8; *see generally* 4 W. LaFave, *Search & Seizure*, § 10.6(c) (3d ed. 1996). Others are wary of importing that theory from the closely-regulated industry context, but consider that the searches can be upheld as "reasonable" under a straightforward balancing of necessity and efficacy against intrusiveness. *See Edwards*, 498 F.2d at 498 & n.5 (Friendly, J.) (pointing out that importing administrative search theory, while that one "most nearly applicable" to these searches, would present difficulties and holding that airport searches could be upheld by facing directly the "issue of reasonableness").

This court has not had occasion to consider the appropriate theory of justification for blanket entry-point suspicionless searches. For purposes of addressing the contentions of Bain and the City in this case, it suffices that, as Judge Friendly observed in *Edwards*, the question under any theory ultimately turns on whether such searches are "reasonable" under a traditional balancing analysis. *See United States v. Albarado*, 495 F.2d 799, 804-05 (2d Cir. 1974) (drawing from both *Terry* and the "administrative search" decisions in defining airport blanket search issue as "whether in the totality of circumstances such a search is reasonable").

under programs formally promulgated by responsible federal agencies for nationwide application under agency oversight. *See Davis*, 482 F.2d at 896-904 (reciting FAA's role in promulgating and implementing blanket airport search program); *Downing*, 454 F.2d at 1231 (reciting GSA's comparable role in respect of courthouses and other guarded facilities). The programs addressed on-going risks or threatened risks of violence at these particular facilities whose serious consequences and nationwide scope were fully and indisputably documented in the public records. *See, e.g., United States v. Pulido-Baquerizo*, 800 F.2d 899, 901 (9th Cir. 1986) (emphasizing statistical evidence of increased risk of terrorism at airports); *Downing*, 454 F.2d at 1231 & n.1 (taking judicial notice of "outbreaks" of acts of violence at or threatened at federal buildings). The violence experienced or threatened at those facilities was by conduct whose very unpredictability made specific advance identification of its likely perpetrators impossible and blanket searches of all persons seeking entry to the facility therefore the only feasible means of intercepting weapons and explosives. *See, e.g., United States v. Moreno*, 475 F.2d 44, 48-49 (5th Cir. 1973) (so emphasizing in respect of aircraft hijacking threat).

Finally, and most critically, under those programs physical searches, either of persons or their effects were conducted only after physically unobtrusive electronic screening devices had raised individualized suspicion by indicating the possible presence of weapons or explosives. In consequence, the search procedures involved no more intrusion than was necessary to achieve their limited purpose of preventing entry rather than detecting and apprehending criminals. *See Davis*, 482 F.2d at 908 (so holding, in upholding airport blanket searches as a form of "administrative screening search"); *cf. Albarado*, 495 F.2d at 805-06 (applying this requirement in separately assessing magnetometer screening and follow-up physical "frisking" procedures employed under airport search program).

As the courts most intensively analyzing the airport/courthouse blanket search procedures expressly noted, upholding them required recognizing a new exception—spawned by a new national exigency—to the probable cause requirement. *See, e.g., Davis*, 482 F.2d at 908-12 (pointing out inapplicability of *Terry*-search exception and relying on "administrative search" analogy); *Albarado*, 495 F.2d at 803-04

(drawing on both *Terry*-search and "administrative search" precedents to recognize related but new exception). In consequence, what emerged was a carefully constrained special exception of quite narrow scope. It permits blanket suspicionless searches of all persons and their effects at the entry points to particular areas only where: the purpose is the administrative one of preventing the entry of weapons or explosives rather than the detection and apprehension of criminals; the risk of violence from the introduction of weapons or explosives is reliably established as a significant possibility; because of the impossibility of identifying possible carriers by any other practical means, blanket searches of all seeking entry is the only feasible way to achieve the administrative purpose and is demonstrably an efficacious way of achieving it; and the procedure employed is one of which advance notice is given and which, by permitting physical searches only after electronic screening has created individualized suspicion, insures that the means are not more intrusive than required to achieve the purely preventive purpose. *See id.*

Simply to state the exception is to demonstrate the difficulty of applying it to justify the kind of localized, ad hoc search procedure at issue in this case. Reflecting the difficulty, the federal courts that have been asked to uphold comparable local area-entry searches on this basis have consistently declined to do so, finding the airport/courthouse exception not applicable for various reasons. *See, e.g., Wilkinson*, 832 F.2d at 1339-1340 (holding airport/courthouse search exception not applicable to justify first-instance pat-down frisk of all persons seeking entry to violence-threatened KKK rally; preliminary magnetometer screening required to make intrusion reasonable on balance); *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977) (holding airport-search exception not applicable to random drug and weapons searches of rock-concert patrons at entrance to municipal auditorium: danger posed "substantially less;" procedure not as effective; intrusion greater because random and not preceded by electronic screening); *Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976) (holding airport exception not applicable to random searches for alcoholic beverages and containers of persons attending events at public stadium: risk of violence not equivalent; procedures not as effective; intrusion more substantial because of discretionary administration); *Gaioni v. Folmar*, 460 F. Supp. 10 (N.D. Ala. 1978) (same, as to random entry searches for drugs and alcohol at civic center rock concert:

danger not equivalent; intrusion greater because of discretionary administration; consent from advance notice not constitutionally inferable); *Stroeber v. Commission Veteran's Auditorium*, 453 F. Supp. 926 (S.D. Iowa 1977) (holding random searches of persons attending rock concert at public auditorium not justified on *Terry*-analogy: no individualized suspicion established before physical search conducted).[6]

The physical searches here were not justified under the airport/courthouse exception for the same reasons emphasized by these federal decisions. In the first place, the locally-confined, episodic vio-

[6]Bain and the City refer us to no federal decision, and we are aware of none, upholding comparable local area-entry searches. And, they make no effort to distinguish any of the federal decisions uniformly finding them not justified by analogy to the airport/courthouse search decisions or otherwise. They rely only on two state court decisions upholding blanket weapons searches of public school students, *People v. Dukes*, 580 N.Y.S.2d 850 (N.Y. Cr. Ct. 1992); *In the interest of F.B.*, 658 A.2d 1378 (Pa. Super. 1995), and one upholding, with some critical judicial adjustments, a formally promulgated pre-admittance visual search procedure at a professional football stadium, *Jensen v. City of Pontiac*, 317 N.W.2d 619 (Mich. App. 1982). Assuming that they properly apply the exception, all three are readily distinguishable on their facts in applying it.

In the school-search cases, as those courts emphasized, the procedures were conducted pursuant to formally promulgated board of education directives; were administered on blanket, non-discretionary bases that utilized mechanical screening before any physical search; and involved public school students having reduced levels of privacy expectation. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

In *Jensen* as the court properly emphasized, the search procedure was conducted pursuant to a formally promulgated directive by the responsible state agency to deal with a documented, ongoing pattern of serious injuries sustained by spectators from thrown beverage containers; as modified by the court, it required non-discretionary searches of all persons having the visible means of carrying such concealed objects; and it allowed only visual, non-touching inspections of clothing or containers opened upon request by persons who had been given the option of removing any forbidden objects or declining to allow the visual inspection.

lence threatened here, hence the public interest in its prevention, was nowhere near the widespread, ongoing violence and commensurate public interest addressed by the federal blanket search programs. Next, the reality and imminence of any violence threatened here was not a matter of documented public record, but was based only on anecdotal, necessarily speculative information the most specific of which was provided third-hand by an anonymous source.[7] Relatedly, the ad hoc search procedure set up to deal with the perceived threat could not be considered a "regulatory scheme" of the sort courts have considered necessary to treating area-entry searches as a species of "administrative search."

The search procedure employed here was not one driven, as were the airport/courthouse search programs, by necessity for lack of *any* practical alternative means for preventing violence. The record indicates that a not inconsiderable police force had been assembled and was available for patrolling and monitoring the rally area, and that the means for general electronic and helicopter surveillance of the area was also present. Those alternative means obviously may not have been completely effective in preventing the feared violence. That they were available, however, makes it impossible to say here what was thought critical to upholding the airport/courthouse blanket search programs: that there literally was no other feasible alternative having any chance of success. And, in this connection, it is significant that the state law enforcement agency, fully aware of the nature of the threat of violence and of the alternative means available to deal with

[7]By this assessment we do not mean to belittle or second-guess the perception of threatened violence upon which Chief Bain ultimately acted or the precautionary measures that he thought the threat as he perceived it warranted. That the information of an impending confrontation may have been unfounded all along is beside the point. So is the possibility that the threat was a real one that dissipated in the interval. In either event, prudence and responsibility dictated that the threat be treated with the seriousness it received. The question is only whether the final step of conducting suspicionless searches of these claimants' personal effects nevertheless overstepped the bounds of reasonableness established by the Fourth Amendment.

it, was doubtful that more was needed and specifically questioned the propriety of the search procedure.[8]

Furthermore, the procedure was not, as conceived, a practically efficacious one for preventing the introduction of weapons by anyone who might be carrying them, or even just by all members of particular suspect groups. Instead, as designed and administered, this procedure was more a sieve than an essentially fool-proof scheme such as the airport/courthouse search programs for preventing entry of any weapons or explosives into a threatened area or facility. Here, only those who sought to ride their motorcycles into the fairgrounds were subjected to the search procedure. Anyone who parked his motorcycle was allowed entry without search. So far as appears, such a person could carry into the area any weapons or explosives that would have been the targets of search at the checkpoint. While it is conceivable that some persons carrying weapons may have been deterred from seeking entry simply because of the known existence of the checkpoint, there is no evidence that even this occurred.

Closely related to this general lack of efficacy in the overall procedure, the checkpoint searches made were not in fact blanket searches even of those who entered the checkpoint. Apparently as a matter of discretionary judgment of those operating the checkpoint, only those persons riding motorcycles that had saddlebags or other closed compartments or who carried unworn clothing were subjected to physical searches. So far as appears, whether one's clothing was searched depended upon whether it was being worn. The whole search procedure at the checkpoint therefore involved a discretionary selective process not based on individualized suspicion and indeed not reasonably adapted to the ultimate purpose.

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[8]To justify a warrantless search or seizure as reasonable does not require government proof that no less intrusive means than those employed were available to achieve the asserted purpose of the search or seizure, *see Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983); but the availability of such alternatives is relevant to the reasonableness of the government agents' failure to recognize or pursue them, hence to the reasonableness of the search or seizure conducted. *See United States v. Sharpe*, 470 U.S. 675, 687-88 (1985). It is on the latter basis that we consider the alternatives available here.

Finally, the physical searches here were not preceded by any form of unobtrusive mechanical screening giving rise to individualized suspicion. Because such a first-stage, non-physical screening process makes the procedure no more intrusive than necessary to achieve its limited preventive purpose, it has been considered critical by courts upholding as reasonable the airport and courthouse search programs. Its absence here critically distinguishes those decisions and the procedures that they upheld.[9]

We therefore conclude that the district court did not err in holding that the physical searches challenged here violated the Fourteenth and Fourth Amendment rights of those class members who were subjected to them.

IV.

We next consider whether, as Norwood claims, the district court erred in declining to award any monetary relief, including nominal damages, for the Fourth Amendment violation that it found and declared.[10] Specifically, the question presented is whether, under controlling legal principles, the proof supported an award of compensatory damages for actual injury sustained by class members; or, if actual injury was not proved, of "presumed" damages; or if neither

[9]Bain and the City seem to suggest, see Appellees' Br. at 32, that when, as here, preliminary mechanical screening proves infeasible, it is simply excused and suspicionless physical searches thereupon become reasonable under the airport/courthouse blanket search exception. No authority for this suggestion is cited and we do not think it may be implied from the principal decisions recognizing the exception. Beyond that, we do not think that the exception could survive as a reasonable one if such an open invitation to evasion were incorporated.

[10]We must address this issue because without regard to whether, as we discuss in Part IV, Bain was entitled to qualified immunity on the claim for damages, the City remains liable for any damages that may be awarded. The district court's ruling that Bain was the official policymaker for the City in setting up and directing conduct of the checkpoint and that the City was therefore liable for any constitutional violations in its conduct has not been challenged on this appeal. And, the City has no immunity to such an award. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

was available, at least of nominal damages. We conclude that the court did not err in declining to award compensatory damages either for actual injury proven or as presumed damages, but did err in declining to award nominal damages.[11]

A.

Compensatory damages may be recovered in § 1983 actions for proven violations of constitutional right, but only for any actual harms caused by the violation and not for the violation standing alone. *Carey v. Piphus*, 435 U.S. 247 (1978) (procedural due process); *Memphis Community Sch. District v. Stachura*, 477 U.S. 299 (1986) (procedural due process and First Amendment). Actual harms resulting from conduct that violated the right may include economic loss, physical injury, or emotional distress. *See, e.g., Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985) (emotional distress caused by illegal strip search); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (pain and suffering and medical expense caused by police brutality to person in custody).

Here, the district court concluded that no such actual harm resulting from conduct of the physical searches was proven. There was no evidence of any loss of or damage to property nor of any physical injury or even touching sustained in the course of the searches. The only evidence of emotional distress came in the form of testimony by Norwood and four other class members that they felt annoyance, humiliation, and indignity at being subjected to the searches. None testified that their emotional upset was caused by oppressive or threatening conduct by the checkpoint officers; instead, from all that appears, that conduct was civil and non-threatening throughout the process. Under the circumstances, we agree with the district court that this testimony failed to prove emotional distress other than any that may have been experienced as a sense of indignity from the very violation of constitutional right. And, that, as indicated, is not a compensable harm in § 1983 litigation.

[11]Norwood also claimed punitive damages, which the district court of course denied in declining to award any compensatory damages. Because there is no proof of the kind of bad faith or deliberate overreaching that would support such an award, we affirm that ruling without further discussion.

Accordingly, the district court did not err in finding that Norwood had failed to prove a compensable actual harm from the physical searches. *See Aubin v. Fudala*, 782 F.2d 280 (1st Cir. 1983) (comparable failure to prove actual harm from unlawful search of claimants' residence).

B.

In a fall-back position, Norwood contends that if actual harm was not sufficiently proven, the circumstances here were such that an award of substantial "presumed damages" was warranted. We disagree.

Carey and *Stachura* both acknowledge that in some circumstances, "presumed damages" may be awarded for constitutional violations in the absence of proof of actual harm, though neither found such an award warranted in the circumstances before the court. *See Carey*, 435 U.S. at 264; *Stachura*, 477 U.S. at 310-11. This is said in *Stachura* to occur where compensation is sought "for an injury that is likely to have occurred but difficult to establish." *Id.* By definition, that situation is not presented where the specific right claimed to have been violated is one whose violation will, if it results in any actual harm, present no difficulty in proving either the harm or its extent. Violation of the specific Fourth Amendment right not to be unreasonably searched that was claimed here is just such a right. There was no inherent difficulty in proving any economic or physical or emotional harm that may have resulted or in quantifying the amount of that harm under established damages law. *See Stachura*, 477 U.S. at 312 (holding that "no rough substitute for compensatory damages was required" where the existence and extent of any "monetary and nonmonetary harms caused by [the constitutional violation]" could properly be assessed by the jury).

The problem here was not that the claim was such that proof either of compensable harm or its extent was inherently difficult, but that proof of actual harm simply was not forthcoming. Accordingly, the district court did not err in declining to award "presumed" damages.

C.

Norwood's final fall-back position is that the class was entitled to an award at least of nominal damages for the found violation. The dis-

trict court declined to award even nominal damages on the assumed authority of this court's split panel decision in *Ganey v. Edwards*, 759 F.2d 337 (4th Cir. 1985). We agree with Norwood that in so ruling, the court erred.

Ganey dealt only indirectly with the specific question of entitlement of right to an award of at least nominal damages once a violation of constitutional right has been established. Its specific holding was only that an award of nominal damages was not necessary to establishing that for attorney fee purposes under 42 U.S.C. § 1988 a claimant was a prevailing party. *See Ganey*, 759 F.2d at 340. In so holding, the *Ganey* court did, however, assume that the Supreme Court's decision in *Carey* had not, as it seemed literally to do, *see Carey*, 435 U.S. at 267 ("will be entitled"), held that in such circumstances a claimant is entitled of right to an award of nominal damages. *See Ganey*, 759 F.2d at 340. To the extent *Ganey* rested on that assumption, it has since been shown to be an erroneous one by the Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), which expressly recognized that *Carey* established the right to a nominal damage award in that circumstance. *See id.* at 112 ("*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right] but cannot prove actual injury").

Accordingly, we will vacate that portion of the district court's judgment that denies any monetary relief and remand for entry of an award of nominal damages not to exceed $1.00.

V.

There remains the question whether, as Bain contends, the district court erred in holding that he was not entitled to qualified immunity on the physical search claim.[12]

[12]That issue as it now comes to us could be thought to have little legal or practical significance—either to the ultimate result in this case or as a matter of precedent. The award's nominal amount and the fact that in any event the City will remain liable for it makes Bain's immunity a matter of no practical consequence. The limited precedential authority of any fact-specific application of qualified immunity doctrine makes resolution of that issue here of limited legal significance. Be that as it may, the issue is properly presented and requires decision.

The basic qualified immunity principles, though not always their application, are clear. Two questions require resolution (if contested): (1) whether the particular right allegedly violated was one clearly established at the time, and (2) if so, whether a reasonable person in the state-official's position would have known that doing what he did (or directed) would violate it. *Pritchett v. Alford*, 973 F.2d 307, 312-13 (4th Cir. 1992). Because qualified immunity is an affirmative defense, the party asserting it must, to prevail upon it, prove either that (1) the right was not a clearly established one at the time allegedly violated, *see Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) or (2) even if the right was then clearly established, a reasonable person in his position could nevertheless have believed that his conduct would not violate it, *see Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

In determining whether the right at issue was clearly established (a pure question of law), the proper focus is not upon the right at its most general level but at the level of its application to the specific conduct being challenged. *Pritchett*, 973 F.2d at 312. And in determining whether a reasonable person in the state-official's position could have believed that what he did (or directed) would not violate that particularized right, a court must take into account the information then actually or constructively in his possession and any exigencies of time and circumstances that reasonably could have affected his perception (possibly a mixed fact/law question). *See id.* at 312-13.

The right violated here was the Fourth Amendment right not to have one's effects searched by state officials without a warrant, or probable cause, or consent, unless under one of the judicially recognized exceptions such as exigency or border-entry. At its more particularized level, it was the right not to have such a search conducted at an area-entry checkpoint set up, on the basis of information that violence involving weapon use by motorcycle riders might occur at a planned event, to prevent the introduction of weapons by that particular suspect group into the area.

Bain's challenge to the district court's ruling is only to the court's conclusion that the right—which we have now held was violated—was not, however, at the time a clearly established one. He does not contend that though the right was violated, there were exigencies of

time or circumstance that nevertheless made it reasonable for him to believe that ordering and directing the searches would not do so. *See id.* Nor could he. This is not a situation where a police officer was confronted with a fast-moving situation involving immediate threat to himself or others that required quick action on perhaps a mistaken perception of the true circumstances. In such situations, qualified immunity principles may require finding a resulting violation of right nevertheless excusable as a reasonable one under the circumstances. *See, e.g. Gooden v. Howard County*, 954 F.2d 960, 967 (4th Cir. 1992) (en banc). That is not the situation here, where Bain's decision was one taken after unhurried deliberation and with ample opportunity for reflection and counsel.

His argument therefore rests entirely on the contention that, as a matter of law, the right violated here was not one clearly established at the critical time. And, specifically, the contention is that it was at least reasonably arguable under then extant law that the searches were justified either because made incident to seizures at a valid motorist checkpoint, or because they were comparable to the airport and courthouse blanket searches that have been upheld under the special exception found warranted in those contexts.

A "survey of the legal landscape" as it then existed directly refutes the contention that among reasonable police officers in Bain's position either exception was even arguably applicable.[13] To demonstrate this, it suffices to recapitulate the survey of relevant decisional law we made in the course of finding the right violated.

The Supreme Court's decision in *Ortiz*, 422 U.S. at 896-97, had by then flatly held that the mere fact that circumstances justify temporary suspicionless seizures of motorists for observation and questioning at

[13]As we have recognized, though there are obvious differences in the methodology and purposes of the two, our review of the "clearly-established" issue in qualified immunity cases and of the "clearly-established" or "new-rule" issue in application of the retroactivity rule of *Teague v. Lane*, 489 U.S. 288, 299-310 (1988), involve essentially parallel surveys of the legal landscape. *See O'Dell v. Netherland*, 95 F.3d 1214, 1223, 1225 (4th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1969 (1997).

"motorist checkpoints" does not also justify searches of their vehicles and personal effects without individualized suspicion.

As to whether extant law could reasonably have been thought by "police chiefs of reason" in Bain's position to justify the searches under the airport/courthouse exception, extant decisional law was comparably at odds with the possibility. To summarize: the Supreme Court had not then addressed the reach of that exception past its application in the airport/courthouse context; the one federal court of appeals decision, that of the Second Circuit in *Wilkinson v. Forst* that had addressed its application to an ad hoc search procedure at a local event had held on facts quite close to those here at issue that it could not be applied to justify previously unscreened physical searches at the entry to a violence-threatened event; at least four federal district court decisions addressing local situations comparable to that here in issue, including one from this circuit, had at that time come to the same conclusion.

Against this array of lower federal court decisions uniformly finding the exception not applicable in local event contexts because of critical intrinsic distinctions from the airport/courthouse context, Bain is unable to cite any federal decision to the contrary and we are aware of none. He relies entirely on three state court decisions: two upholding blanket searches of public school children for weapons and drugs in response to a documented record of weapons and drug-ban violation; the third upholding a tightly constrained consensual inspection of containers capable of carrying beverage bottles into a professional football stadium in response to documented evidence of patron injuries from thrown bottles. Assuming proper application in those cases (irrelevant to the landscape survey purpose) each, as indicated, is critically distinguishable from the situation here at issue. *See* Part II, *ante*.

This being the relevant legal landscape at the time in issue, it could be said to support a conclusion that the right here was not then clearly established (because the non-applicability of one or the other exception was not clearly established) only on two bases. First, that police chiefs in Bain's position may not be held to awareness and basic understanding of the principal decisional law that defines that landscape. Second, that missing from this landscape is any authoritative

decision flatly holding the airport/courthouse exception not applicable to an indistinguishable factual situation.

The first basis cannot be accepted. While the legal awareness and understanding of police chiefs (and comparable executive officers) cannot be perfectly equated with that of "jurists of reason" in assessing comparable legal landscapes for related purposes, it must be held at least to the basic level posited. The requirement of qualified immunity doctrine that courts in judicial review are to assess that same landscape necessarily assumes that level of accountability.

The second basis has long since been rejected. "'Clearly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked." *See Pritchett*, 973 F.2d at 314.

Accordingly, we conclude that the district court did not err in finding Bain not entitled to qualified immunity.

VI.

We affirm the district court's decisions that the videotaping procedures at the checkpoint did not make the seizures unreasonable; that the physical searches of class members' effects were unreasonable, hence violated their Fourth Amendment rights; that the class members had not proved entitlement to substantial compensatory damage or to punitive damages; and that Chief Bain was not entitled to qualified immunity for the search violation found by the court. We find error in the district court's decision that the class members were not entitled to an award of nominal damages for the proven violation of their rights. We therefore vacate that portion of the district court's judgment and remand with directions to enter a judgment in behalf of those class members whose personal effects were searched for nominal damages not to exceed $1.00.

SO ORDERED

WILKINS, Circuit Judge, concurring in part and dissenting in part:

The majority correctly recognizes that, based on the information available to law enforcement, the checkpoint stop and videotaping of Plaintiffs and their driver's licenses by Spartanburg, South Carolina police officers[1] as Plaintiffs entered a fairgrounds for a charity motorcycle rally to benefit the Red Cross was not violative of the Fourth Amendment. However, the majority erroneously determines that the physical search of Plaintiffs' unworn clothing and motorcycle saddlebags violated their rights under the Fourth Amendment. To the contrary, Spartanburg's interest in protecting public safety by preventing members of warring rival motorcycle gangs from carrying concealed weapons into a crowded public event, the extent to which the search reasonably was thought to advance that interest, and the modest degree of intrusion upon those individuals who were subject to the search clearly weigh in favor of a conclusion that the search was reasonable. Accordingly, I would hold that the search did not transgress constitutional bounds. Furthermore, even if the majority were correct that a portion of the search was unconstitutional, Chief of Police Bain nevertheless would be entitled to qualified immunity because it was not clearly established in September 1994, when the rally took place, that this search was unreasonable.

I.

The guarantee of privacy and security from unreasonable governmental intrusion provided by the Fourth Amendment long has been recognized as fundamental to the maintenance of a free society. *See Camara v. Municipal Ct. of the City & County of San Francisco*, 387 U.S. 523, 528 (1967). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affir-

[1]Plaintiffs named as Defendants the City of Spartanburg and W. C. Bain, Jr., individually and in his official capacity as the Chief of the Spartanburg Police Department. For ease of reference, I refer to Defendants collectively as "Spartanburg."

> mation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[2] Simply put, this amendment guarantees that governmental intrusions into privacy by means of searches or seizures will be reasonable. Typically, this reasonableness requirement acts as a constraint on governmental authority to undertake a search or seizure in the absence of individualized suspicion. *See Chandler v. Miller*, 117 S. Ct. 1295, 1298 (1997). In addition, a search performed without a warrant is unreasonable per se unless it fits within a narrowly defined exception to the warrant requirement. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (en banc). Nevertheless, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). Instead, a determination of reasonableness compels a weighing of the governmental interest prompting the invasion; the effectiveness of the intrusion, *i.e.*, the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective standpoint. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *id.* at 451-55 (applying test); *Von Raab*, 489 U.S. at 665 (explaining that when "a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context"). *Compare United States v. Davis*, 482 F.2d 893, 908-12 (9th Cir. 1973) (explaining that an entry search at an airport was not unconstitutional despite a lack of individualized suspicion or warrant, because a very real chance of danger to the public existed from allowing concealed weapons or explosives onto a commercial airliner, the search method was effective, the degree of intrusion was the least possible to accomplish the goal, and all those entering were subjected to the same treatment), *with Wheaton v. Hagan*, 435 F. Supp. 1134,

[2]The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *See Ker v. California*, 374 U.S. 23, 30 (1963).

1145-46 (M.D.N.C. 1977) (holding pat-down searches and searches of purses and clothing for drugs and alcohol by officers stationed at the door of a coliseum were not constitutional because there was little public necessity and the degree of intrusion was high and was exacerbated by the fact that officials exercised discretion concerning whom to search). Here, the question is whether consideration of Spartanburg's interest in public safety, the effectiveness of the search, and the intrusion experienced by the individuals who entered the rally on motorcycles and whose unworn clothing and motorcycle saddlebags were searched weighs in favor of a conclusion that the search was violative of the Fourth Amendment.

A.

The first factor to be considered is the governmental need. "[T]he proffered special need ... must be substantial—important enough to override the individual's acknowledged privacy interest, [and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler*, 117 S. Ct. at 1303. The hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one. *See id.* Although evidence that the problem has manifested itself previously is not always necessary to demonstrate the concreteness of the potential harm, such evidence bolsters an argument that a harm is sufficiently tangible to give rise to a special need. *See id. Compare Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 606-08 (1989) (holding that a concrete special need existed for random drug testing in part because of evidence of drug and alcohol abuse by railroad employees), *and Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-65 (1995) (explaining that a sharp rise in drug use by student athletes supported school officials' assertion that random drug testing without individualized suspicion was warranted), *with Chandler*, 117 S. Ct. at 1303 (noting that Georgia failed to demonstrate concrete harm to support drug testing of candidates for public office in absence of evidence that Georgia had a particular problem with state officeholders abusing drugs).

Although the majority attempts to downplay the amount and reliability of the information Spartanburg possessed, a significant quantity of information indicated a very real possibility of an extremely

dangerous situation—an armed confrontation between large numbers of violent, rival motorcycle gang members at a public event. First, reserve officer Carl McKinney learned from a coworker who had been involved with a motorcycle gang that a confrontation between the Hell's Angels and Pagans was planned during the rally and that because the gang members intended to "drop their colors,"[3] law enforcement officers would not be able to identify them. McKinney passed this information along to his superiors. Second, Lieutenant Ron Cook, an expert on motorcycle gangs employed by the South Carolina Law Enforcement Division (SLED), advised Spartanburg that the Hell's Angels and Pagans were engaged in an ongoing conflict for territorial control of South Carolina. He further advised that this turf struggle had led to at least two violent public altercations among gang members during the past several months, one in South Carolina and one in New Jersey. According to Cook, the Pagans had threatened retribution following these incidents. Cook further informed Spartanburg that motorcycle gang members often carry weapons concealed in their motorcycle saddlebags.[4] Third, one of the chairpersons of the event requested that Spartanburg officers investigate an individual whom the chair had learned was planning to attend the event. This investigation disclosed that the individual was a known member and organizer of the Hell's Angels. The chairperson later informed Spartanburg that this individual had expressed an interest in the rally, but would not commit concerning whether the Hell's Angels would attend. Fourth, in the weeks prior to the rally, Cook learned from a Virginia State Police intelligence report that the Pagans had been directed by their leadership to make a mandatory ride to an undisclosed location on the day prior to the Spartanburg rally. Further, Cook received information that the Hell's Angels would be attending a rally in Cherokee, North Carolina scheduled for the same weekend as the Spartanburg rally and that the group planned to attend the Spartanburg rally after leaving North Carolina. Finally, on the evening before the event, one of the chairpersons of the rally

[3]"Colors" are insignia worn to identify membership in a particular motorcycle gang. When members of a motorcycle gang "drop their colors," these insignia are not worn so that identification of the gang member is more difficult.

[4]Cook indicated that the weapons likely to be carried were ball peen hammers with leather straps, large wrenches, and guns.

telephoned a Spartanburg official to advise him that as many as 3,000 to 4,000 bikers from the Cherokee rally were going to converge on the South Carolina event and to express concerns regarding security. Under these circumstances, it cannot be seriously disputed that the governmental interest at stake was an extremely grave and genuine matter of public safety.

The majority argues that because the nature of the harm was local and episodic, public interest in the searches was far less than that supporting blanket searches at airports and courthouses pursuant to nationwide regulations. Of course the majority is correct that the type of harm presented here was different in scope from that justifying searches at airports and courthouses, but so was the scope of the search. I do not suggest that the danger faced by Spartanburg would warrant checkpoint searches at all motorcycle rallies nationwide or at all large public events conducted in Spartanburg. Because there was no attempt to justify a search of nationwide scope, it is mystifying why the majority believes it necessary to focus on whether a special need that was national in extent was present. *Cf. Vernonia Sch. Dist. 47J*, 515 U.S. at 648-50, 654-65 (applying balancing test to hold that a local drug testing program for student athletes was constitutional despite lack of warrant or individualized suspicion).

The majority also faults Spartanburg for implementing the checkpoint search based on information supplied to law enforcement officers rather than evidence presented to a legislative or administrative body and memorialized in public records. But, a rule that a special need cannot support a search absent a harm established in public records is artificial and unworkable. Undoubtedly, a warrantless search designed to avert great harm, which could be avoided only by an extremely unintrusive type of search applied in a very evenhanded manner would be reasonable and thus would not violate the Fourth Amendment simply because it was not authorized by legislation or a regulatory scheme. For example, suppose law enforcement officials received reliable information that two individuals were transporting a large quantity of explosives by vehicle into a specified city by a specified route in order to blow up a museum where a popular, but controversial, exhibit was on public display. Obviously, under these facts a massive danger to public safety exists that could be averted only by intercepting the would-be bombers. Balancing the severity of the

harm, the effectiveness of the proposed response, and the minimal intrusion to the individuals subjected to a search leads to one conclusion. Law enforcement officials could properly stop all motorists traveling into the area on the identified route and conduct a cursory search of the interior and trunk of the vehicles. Such action would be reasonable and within constitutional bounds.

Under the circumstances presented here, a special governmental interest existed in protecting the public. Spartanburg possessed concrete information that armed, rival motorcycle gangs, the members of which could not be identified, planned to attend the rally. And, the potential for a violent eruption appeared real in light of past altercations between the two groups. Given the large number of participants expected for the rally and the potential for a massive, violent confrontation, Spartanburg clearly possessed a genuine and substantial need to safeguard the public.

B.

The second factor, the effectiveness of the search, focuses on "the degree to which [it] advances the public interest." *Sitz*, 496 U.S. at 453 (internal quotation marks omitted). *Compare Chandler*, 117 S. Ct. at 1304 (noting that "Georgia's certification requirement [was] not well designed to identify candidates who violate antidrug laws" because the testing date was known in advance so that abusers could refrain from using drugs prior to the test), *with Vernonia Sch. Dist. 47J*, 515 U.S. at 663 (explaining that random drug testing of student athletes was an effective means of addressing a drug abuse problem in the student body as a whole because the problem was caused at least in part by students' imitation of the student athletes' drug use). In analyzing this factor, however, we recognize that our review must leave "the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger" to "the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz*, 496 U.S. at 453-54.

There can be little question that searching Plaintiffs' unworn clothing and motorcycle saddlebags was an effective means of preventing the type of weapons motorcycle gang members were purportedly car-

rying from finding their way into the public fairgrounds. Indeed, no other law enforcement effort would have worked as well. Because the metal detectors the officers first attempted to employ in order to avoid individualized searches were ineffective, an effective method of search less intrusive than the one employed was not possible. And, without the checkpoint search, Spartanburg would not have obtained individualized suspicion that specified individuals possessed weapons until the gang members already had entered into the fairgrounds, become a part of the large crowd, and brandished or used their weapons. By that time, the threat of a violent confrontation would have been fully realized. *See Davis*, 482 F.2d at 910 (noting in support of a conclusion that airport checkpoint searches are constitutional that "[l]ittle can be done to balk the malefactor after [weapons or explosives are] successfully smuggled aboard[a commercial aircraft], and as yet there is no foolproof method of confining the search to the few who are potential hijackers").

Furthermore, the fact that individuals were permitted to walk into the fairgrounds without being searched provided that they parked their motorcycles outside the fairgrounds does not mean that the search method employed was ineffective.[5] *Cf. McMorris v. Alioto*, 567 F.2d 897, 899 (9th Cir. 1978) (search must be no more intrusive than necessary to be reasonably effective). The information available to Spartanburg indicated that motorcycle gang members not infrequently carried weapons in their motorcycle saddlebags. Thus, it was reasonable for Spartanburg to conclude that the likelihood for the transportation of weapons into the fairgrounds was less for individuals who parked their motorcycles outside and walked to the rally. And, it is important to realize that these weapons could not have been concealed easily in the tight T-shirts and blue jeans—or less—worn by the majority of the bikers on that very hot September afternoon. Additionally, even if reasonable law enforcement officials could have concluded that a search of the individuals entering the fairground on foot would have been more thorough, it is not within our province to question the decisions of officials concerning a choice of law enforcement techniques among reasonable alternatives.

[5]It is worth noting that Cook was stationed outside the pedestrian entrance gate to attempt to identify any notorious gang members entering on foot.

C.

Finally, the degree of intrusion, both objective and subjective, suffered by individuals submitting to the search indicates that the checkpoint search of Plaintiffs' unworn clothing and motorcycle saddlebags was constitutional. The objective intrusion suffered by an individual is "measured by the duration of the seizure and the intensity of the investigation." *Sitz*, 496 U.S. at 452. The subjective level of intrusion measures how the method chosen minimizes or enhances fear and surprise on the part of those searched or detained. *See id.* Here, the objective intrusion experienced by Plaintiffs was certainly more than minimal. While the searches were very brief, the intensity of a visual search of the interior of private belongings undoubtedly was objectively intrusive. However, the intrusiveness of the search was lessened by the fact that the entrants to the fairgrounds were informed that they would be subjected to the search only if they wished to enter on motorcycle and would be permitted to enter without a search if they chose to park their motorcycles and enter as pedestrians. All of those who entered the fairgrounds on motorcycles with unworn clothing or saddlebags were subjected to the search. *See id.* (explaining that a checkpoint search where all entrants are searched is considerably less intrusive than a search by roving patrols that exercise discretion over whom to stop and search); *see also Turner v. Dammon*, 848 F.2d 440, 446-47 (4th Cir. 1988) (explaining that "[t]he cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches"). Accordingly, the search was no more intrusive than that required to protect against the harm Spartanburg sought to avoid. *See McMorris*, 567 F.2d at 899; *see also Wilkinson v. Forst*, 832 F.2d 1330, 1340-41 (2d Cir. 1987) (holding that pat-down searches for weapons of all entrants into a Ku Klux Klan rally were excessive, that future searches by magnetometer were permissible, and "that more intrusive measures might be justified by future events").

D.

In sum, a genuine and substantial threat to public safety existed that created a special need beyond that of the traditional law enforcement goals of apprehension and detection of criminal conduct; the method chosen to address that need effectively advanced the public interest

in a manner that could not have been equaled by a scheme requiring individualized suspicion or a warrant; and the intrusion suffered by those individuals who submitted to the search, while not insignificant, was no greater than necessary to achieve the desired goal. Therefore, a balancing of these factors clearly demonstrates that the search conducted was reasonable and thus not violative of the Fourth Amendment.[6]

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[6]The decision of the Supreme Court in *United States v. Ortiz*, 422 U.S. 891 (1975), and the decision of this court in *United States v. Gallagher*, 557 F.2d 1041 (4th Cir. 1977) (per curiam), are not to the contrary. In *Ortiz*, in addressing whether a checkpoint search of vehicles for illegal aliens that was not conducted at the border or its functional equivalent was constitutional, the Supreme Court remarked that "at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." *Ortiz*, 422 U.S. at 896-97. In *Gallagher*, we echoed this concern stating:

> [There is a] long-recognized distinction between border searches and those taking place in interior locations. "Travellers may be ... stopped in crossing an international boundary because of national self protection ...." "[S]earches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well." At points other than the border or its functional equivalent, however, officers may not search private vehicles absent consent or probable cause.

Gallagher, 557 F.2d at 1043 (citations omitted) (second & fourth alterations in original).

Despite their broad language, *Ortiz* and *Gallagher* can be distinguished. First, the *Ortiz* Court did not apply the *Sitz* balancing test. Second, an application of that test to the facts of *Ortiz* leads to the conclusion that the searches at issue there were violative of the Constitution. Finally, and most importantly, *Ortiz* addressed the situation presented when law enforcement officers attempt to justify a traffic checkpoint search by reference to illegal alien interdiction efforts. Because *Ortiz* was addressing only a checkpoint to prevent illegal immigration, it does not address whether there could be other potential harms that might justify checkpoint searches of automobiles for other reasons. Additionally, in *Gallagher*, this court held that the search at issue was a border search, so its statement concerning searches away from the border was dictum.

II.

Even if the majority were correct that Spartanburg deprived Plaintiffs of their Fourth Amendment rights by searching their unworn clothing and motorcycle saddlebags at the entrance checkpoint, the question remains whether Chief of Police Bain should be held personally liable for damages. Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only "for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992) (explaining that "[t]he fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless 'clearly established' for qualified immunity purposes" and that "'[c]learly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked"). As we recently reiterated, "[t]he law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *Wilson v. Layne*, 1998 WL 159673, *2 (4th Cir. Apr. 8, 1998) (en banc) (internal quotation marks omitted).

In analyzing an appeal from the rejection of a qualified immunity defense, the first task of the court is to identify the specific right that the plaintiff asserts was infringed by the challenged conduct. *See Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). The court then must consider whether, at the time of the claimed violation, that right

was clearly established and "'whether a reasonable person in the official's position would have known that his conduct would violate that right.'" *Id.* (quoting *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992)). Review by this court of the denial of summary judgment based on qualified immunity is de novo. *See Pritchett*, 973 F.2d at 313.

The constitutional right that Plaintiffs claim was violated, defined at the appropriate level of specificity, is their Fourth Amendment right to avoid unreasonable searches or seizures resulting from the individualized checkpoint search of their unworn clothing and motorcycle saddlebags for the purpose of detecting weapons when reliable information indicated that a real danger existed that armed members of warring motorcycle gangs planned to attend the rally. The qualified immunity question presented, then, is whether in September 1994 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it.

As the majority recognizes, when this incident took place, there was no clear law from the Supreme Court, this court, or the South Carolina Supreme Court addressing whether officers violate the Fourth Amendment by conducting an individualized search at a checkpoint—without individualized suspicion or a warrant—when a grave matter of public interest is at stake, an effective means of preventing that harm is available, and the searching technique employed is no more intrusive than necessary to prevent the harm feared. The Supreme Court had announced, however, that this balancing test was the appropriate one to assess the reasonableness of a search conducted without individualized suspicion or a warrant. Under this authority, a reasonable law enforcement officer may well have concluded that this type of search was constitutional as analogous to administrative searches at airports or courthouses. In my opinion, at most the question of whether the constitution was violated by the officers' conduct was a matter over which reasonable jurists arguably could disagree. And, if the answer to this question was not clearly established, a reasonable officer in Bain's position could not have known what it was. *See Wilkinson*, 832 F.2d at 1342 (holding officers were entitled to qualified immunity on similar facts).

III.

In sum, I would hold that neither portion of the checkpoint search —the videotaping of the individuals who entered the fairgrounds by motorcycle and their driver's licenses nor the individualized search of Plaintiffs' unworn clothing and motorcycle saddlebags—violated the Fourth Amendment. In addition, even if the majority were correct that the individualized search violated constitutional bounds, Bain would be entitled to qualified immunity.

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOSEPH H. NORWOOD, individually and as representative of a class of citizens,

Plaintiff-Appellant,

v.

W. C. BAIN, JR., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; CITY OF SPARTANBURG,

Defendants-Appellees.

No. 96-2164

JOSEPH H. NORWOOD, individually and as representative of a class of citizens,

Plaintiff-Appellee,

v.

W. C. BAIN, JR., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; CITY OF SPARTANBURG,

Defendants-Appellants.

No. 96-2184

Appeals from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge.
(CA-95-1016-3-7)

Argued: October 27, 1998

Decided: January 8, 1999

Before WILKINSON, Chief Judge, WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed in part; reversed and remanded in part by published per curiam opinion. Judge Wilkins wrote a separate opinion, in which Judge Williams and Judge Traxler joined in its entirety, and in which Judge Niemeyer joined in Parts I, II, and III. Judge Niemeyer wrote a separate opinion in which Chief Judge Wilkinson, Judge Widener, and Judge Luttig joined.

COUNSEL

ARGUED: W. Gaston Fairey, FAIREY, PARISE & MILLS, P.A., Columbia, South Carolina, for Appellant. Andrew Frederick Lindemann, ELLIS, LAWHORNE, DAVIDSON & SIMS, P.A., Columbia, South Carolina, for Appellees. **ON BRIEF:** Rochelle R. McKim, FAIREY, PARISE & MILLS, P.A., Columbia, South Carolina, for Appellant. William H. Davidson, II, James M. Davis, Jr., ELLIS, LAWHORNE, DAVIDSON & SIMS, P.A., Columbia, South Carolina; H. Spencer King, III, Cathy Hoefer Dunn, LEATHERWOOD, WALKER, TODD & MANN, P.C., Spartanburg, South Carolina, for Appellees.

OPINION

PER CURIAM:

This is a class action brought under 42 U.S.C. § 1983 in which it was claimed that the Fourth and Fourteenth Amendment rights of class members were violated when they were subjected to warrantless stops and physical searches at a police checkpoint set up to prevent the suspected introduction of weapons into a charity motorcycle rally in Spartanburg, South Carolina, by motorcycle gang members. The

class, consisting of motorcycle riders stopped and searched at the checkpoint, sued W.C. Bain, Director of Public Safety for the City of Spartanburg, who ordered and directed the checkpoint operation, in his individual and official capacities, and the City of Spartanburg. The class members sought a declaration of constitutional violations in both the stops and searches to which they were subjected, and compensatory and punitive damages for the constitutional injuries allegedly suffered. Bain and the City denied any constitutional violation and Bain also raised the defense of qualified immunity.

Before trial, the district court, denying cross-motions for summary judgment, rejected Bain's qualified immunity defense and ruled that in setting up and directing the checkpoint, Bain was acting as the City's policy-maker so as to subject it to liability for any constitutional violation found. Following trial on the issues of liability and damages, the district court, to whom the issues were submitted for decision when the jury was unable to reach a verdict, concluded that (1) no constitutional violation occurred by reason of the temporary stops and videotaping at the checkpoint; (2) the warrantless physical searches of class members' property at the checkpoint violated their Fourth and Fourteenth Amendment rights; (3) the class members searched had proved no entitlement to compensatory or punitive damages resulting from the constitutional violation; (4) neither were they entitled under Fourth Circuit precedent to any award of nominal damages.

The class appealed, challenging the district court's ruling that the checkpoint stops and videotaping did not violate their constitutional rights and the court's ruling that they were entitled to no actual or nominal damage award for the unconstitutional searches declared by the court. The City and Bain cross-appealed, challenging the court's finding of constitutional violation by the checkpoint searches, and Bain also challenged the court's rejection of his qualified immunity defense. The City did not challenge the court's ruling that because Bain was its policy-maker in setting up and directing the checkpoint, it was liable for any resulting constitutional violation found.

On the parties' cross-appeals, a panel of this court: (1) unanimously affirmed the district court's determination that the checkpoint stops and videotaping did not violate the class members' Fourth Amend-

ment rights; (2) by a split decision, affirmed the court's determination that the checkpoint searches did violate the Fourth Amendment rights of those class members whose property was subjected to searches; (3) by a split decision, affirmed the district court's rejection of Bain's qualified immunity defense; (4) affirmed, by majority vote, the district court's determination that the class members subjected to unconstitutional searches had proved no entitlement to compensatory or punitive damages for the violations; and (5) by majority vote, reversed the district court's ruling that those class members were not entitled to any award of nominal damages and remanded for an award not to exceed $1.00. *See Norwood v. Bain*, 143 F.3d 843 (4th Cir. 1998). By majority vote of the active circuit judges of the court, the panel decision was later vacated, and the appeal ordered to be reheard *en banc*. *See id.* at 843.

Having now reheard the appeal *en banc*, the judgment of the en banc court is as follows:

Checkpoint Stop and Videotaping: Affirmed by unanimous vote of the court for reasons given in the vacated panel decision. *See id.* at 848-850.

Search of Saddlebags and Unworn Clothing: Affirmed by an equally divided vote of the court. Judges Murnaghan, Ervin, Hamilton, Michael, Motz, King, and Phillips voted to affirm. Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Luttig, Williams, and Traxler voted to reverse.

Qualified Immunity: Affirmed by an equally divided vote of the court. Judges Murnaghan, Ervin, Hamilton, Michael, Motz, King, and Phillips voted to affirm. Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Luttig, Williams, and Traxler voted to reverse.

Compensatory and Punitive Damages: Affirmed by a unanimous vote of the court.

Nominal Damages: Reversed by majority vote of the court for reasons given in the vacated panel decision. *See id.* at 856. Judges Murnaghan, Ervin, Wilkins, Hamilton, Williams, Michael, Motz, Traxler,

King, and Phillips voted to reverse. Chief Judge Wilkinson and Judges Widener, Niemeyer, and Luttig voted to affirm.

Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the case is remanded to the district court for entry of a judgment in accordance with this opinion that includes an award of nominal damages to the plaintiff class against Bain and the City not exceeding $1.00 for the constitutional violation found by the district court.

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART

WILKINS, Circuit Judge, writing separately:

A conclusion that law enforcement officers cannot, consistent with the Fourth Amendment, attempt to avert a concrete threat of great public harm with a relatively unobtrusive and appropriately effective warrantless search not supported by individualized suspicion and not undertaken for law enforcement purposes creates an unnecessary risk to public safety and is directly contrary to Supreme Court precedent. I write separately to explain why the district court and seven members of this court erred in concluding that Spartanburg, South Carolina police officers[1] violated the Fourth Amendment rights of Plaintiffs by searching their motorcycle saddlebags and unworn clothing as they entered a fairgrounds for a charity motorcycle rally: Spartanburg's interest in protecting public safety by preventing members of warring motorcycle gangs from carrying concealed weapons into a crowded public event, the extent to which the search reasonably was thought to advance that interest, and the modest degree of intrusion upon those individuals who were subject to the search plainly support a conclusion that the search was reasonable. Furthermore, because it was not clearly established in September 1994, when the rally took place, that this search was unreasonable—indeed, circuit authority

[1]Plaintiffs named as Defendants the City of Spartanburg and W. C. Bain, Jr., individually and in his official capacity as the Chief of the Spartanburg Police Department. For ease of reference, I refer to Defendants collectively as "Spartanburg."

indicated that the search was constitutional—Chief Bain is entitled to qualified immunity.

I. Facts

In May 1994, organizers began planning a motorcycle rally to benefit the American Red Cross to be held in September 1994 at a fairgrounds in Spartanburg. Organizers requested that Spartanburg provide assistance with security for the event. Although Spartanburg officials initially believed that off-duty officers would be adequate to maintain order at the rally, as the event neared, information came to light indicating that thousands of members of two rival motorcycle gangs with a past history of violent confrontations—the Hell's Angels and the Pagans—were planning to attend. Based on this information, Chief Bain directed all available officers in his department to work on the day of the rally and ultimately assigned 75 officers to the event.

On the day of the rally, a checkpoint was established on a public street outside an entrance to the fairgrounds. The checkpoint was visible to those approaching the fairgrounds, and persons on motorcycles were informed that they could enter the fairgrounds on foot without passing through the checkpoint if they parked their motorcycles in the parking lot. Officers were instructed to allow anyone to walk freely through the gates. However, persons on motorcycles were stopped, their driver's licenses were examined and videotaped, and their motorcycle saddlebags and unworn clothing were searched for weapons. The officers did not conduct searches of worn clothing or of the riders. Although officers originally had planned to conduct magnetometer screenings, the metal in the motorcycles rendered the magnetometer ineffective, and its use soon was abandoned in favor of searches of the saddlebags and unworn clothing. The officers conducted searches of the saddlebags by asking the riders to open their saddlebags and by then looking inside. In some cases, this procedure also involved removing articles from the saddlebags, while in others the officers merely felt around inside the saddlebags. At the conclusion of the searches, riders were allowed to enter the fairgrounds. The total process for each motorcycle lasted from one to two minutes. The officers were at all times prompt and polite, wishing the riders a good day as they entered the fairgrounds.

Plaintiffs brought this action claiming in pertinent part that their Fourth Amendment rights had been violated in various ways by the checkpoint and search procedure and seeking injunctive and monetary relief. Specifically, Plaintiffs claimed that stopping them at the checkpoint and subjecting them to videotaping was an unreasonable seizure of their persons and that the ensuing inspection of their motorcycle saddlebags and unworn clothing was an unreasonable search of their property.

The district court denied cross-motions for summary judgment, including Chief Bain's assertion of qualified immunity. After the jury that heard the trial evidence was unable to reach a verdict, the parties agreed to allow the district court to decide the case based on the evidentiary record presented. The district court concluded that the initial seizure of Plaintiffs at the checkpoint, where they and their driver's licenses were videotaped, was reasonable and thus did not violate the Fourth Amendment. The court further determined that the searches of Plaintiffs' motorcycle saddlebags and unworn clothing were unreasonable in light of the lack of individualized suspicion. Finding insufficient evidence of compensatory or punitive damages, however, the court declined to award any monetary relief, including nominal damages, for that violation.

II. Search of Saddlebags and Unworn Clothing

The guarantee of privacy and security from unreasonable governmental intrusion provided by the Fourth Amendment long has been recognized as fundamental to the maintenance of a free society. *See Camara v. Municipal Ct.*, 387 U.S. 523, 528 (1967). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[2] Simply put, this amendment guarantees that

[2]The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *See Ker v. California*, 374 U.S. 23, 30 (1963).

governmental intrusions into privacy by means of searches or seizures will be reasonable. Typically, this reasonableness requirement acts as a constraint on governmental authority to undertake a search or seizure in the absence of individualized suspicion. *See Chandler v. Miller*, 520 U.S. 305, 308 (1997). In addition, a search performed without a warrant is unreasonable per se unless it fits within a narrowly defined exception to the warrant requirement. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (en banc). Nevertheless, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). Instead, a determination of reasonableness compels a weighing of the governmental interest prompting the invasion; the effectiveness of the intrusion, *i.e.*, the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective standpoint. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *id.* at 451-55 (applying test); *Von Raab*, 489 U.S. at 665-66 (explaining that when "a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context"); *DesRoches v. Caprio*, 156 F.3d 571, 574 (4th Cir. 1998). *Compare United States v. Davis*, 482 F.2d 893, 908-12 (9th Cir. 1973) (explaining that an entry search at an airport was not unconstitutional despite a lack of individualized suspicion or warrant, because a very real chance of danger to the public existed from allowing concealed weapons or explosives onto a commercial airliner, the search method was effective, the degree of intrusion was the least possible to accomplish the goal, and all those entering were subjected to the same treatment), *with Wheaton v. Hagan*, 435 F. Supp. 1134, 1145-46 (M.D.N.C. 1977) (holding that random pat-down searches and searches of purses and clothing for weapons, drugs, and alcohol by officers stationed at the doors of a coliseum were not constitutional because there was little public necessity; the searches were not an effective deterrent; and the degree of intrusion was high and was exacerbated by the fact that officials exercised discretion concerning whom to search). Here, the question is whether consideration of Spartanburg's interest in public safety, the effectiveness of the search, and the intrusion experienced by the individuals who entered the rally on

motorcycles and whose motorcycle saddlebags and unworn clothing were searched weighs in favor of a conclusion that the search was violative of the Fourth Amendment.

A.

The first factor to be considered is the governmental need. "[T]he proffered special need ... must be substantial—important enough to override the individual's acknowledged privacy interest[and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler*, 520 U.S. at 318. The hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one. *See id.* at 318-19. Although evidence that the problem has manifested itself previously is not always necessary to demonstrate the concreteness of the potential harm, such evidence bolsters an argument that a harm is sufficiently tangible to give rise to a special need. *See id.* at 319. *Compare Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 606-08, 620-21 (1989) (holding that a concrete special need existed for random drug testing in part because of evidence of drug and alcohol abuse by railroad employees), *and Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662-63 (1995) (explaining that a sharp rise in drug use by student athletes supported school officials' assertion that random drug testing without individualized suspicion was warranted), *with Chandler*, 520 U.S. at 318-19 (noting that Georgia failed to demonstrate concrete harm to support drug testing of candidates for public office in absence of evidence that Georgia had a particular problem with state officeholders abusing drugs).

Here, there can be no dispute that Spartanburg possessed a significant quantity of reliable information indicating a very real possibility of an extremely dangerous situation—an armed confrontation between large numbers of violent, rival motorcycle gang members at a public event. First, Officer Carl McKinney learned from a coworker who had been involved with a motorcycle gang that a confrontation between the Hell's Angels and the Pagans was planned during the rally and that because the gang members intended to "drop their colors,"[3]

[3]"Colors" are insignia worn to identify membership in a particular motorcycle gang. When members of a motorcycle gang "drop their colors," these insignia are not worn so that identification of the gang members is more difficult.

law enforcement officers would not be able to identify them as gang members and thus they would be able to infiltrate the gathering more easily. McKinney passed this information along to his superiors. Second, Lieutenant Ron Cook, an expert on motorcycle gangs who was employed by the South Carolina Law Enforcement Division (SLED), advised Spartanburg that the Hell's Angels and the Pagans were engaged in an ongoing conflict for territorial control of South Carolina. He further advised that this turf struggle had led to at least two violent public altercations among gang members during the past several months, one in South Carolina and one in New Jersey. According to Cook, the Pagans had threatened retribution following these incidents. Cook further informed Spartanburg that motorcycle gang members often carry weapons concealed in their motorcycle saddlebags.[4] Third, one of the chairpersons of the event requested that Spartanburg officers investigate an individual who the chair had learned was planning to attend the event. This investigation disclosed that the individual was a known member and organizer of the Hell's Angels. The chairperson later informed Spartanburg that this individual had expressed an interest in the rally, but would not commit concerning whether the Hell's Angels would attend. Fourth, in the weeks prior to the rally, Cook learned from a Virginia State Police intelligence report that the Pagans had been directed by their leadership to make a mandatory ride to an undisclosed location on the day prior to the Spartanburg rally. Further, Cook received information that the Hell's Angels would be attending a rally in Cherokee, North Carolina scheduled for the same weekend as the Spartanburg rally and that the group planned to attend the Spartanburg rally after leaving North Carolina. Finally, on the evening before the event, one of the chairpersons of the rally telephoned a Spartanburg official to advise him that as many as 3,000 to 4,000 bikers from the Cherokee rally were going to converge on the South Carolina event and to express concerns regarding security. Under these circumstances, it cannot be seriously disputed that the governmental interest at stake was an extremely grave and genuine matter of public safety.

Plaintiffs argue that the searches here are analogous to administrative searches conducted at airports and courthouses that have been

[4]Cook indicated that the weapons likely to be carried were ball peen hammers with leather straps, large wrenches, and firearms.

upheld as constitutionally permissible. *See, e.g., United States v. Edwards*, 498 F.2d 496, 498-500 (2d Cir. 1974) (upholding constitutionality of airport searches); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (concluding that search prior to entering courthouse passed constitutional muster). However, Plaintiffs assert, the search here is not supported by the type of demonstrated, nationwide threat of harm that justifies airport and courthouse searches. Rather, Plaintiffs maintain, because the nature of the harm here was local and episodic, the public interest in the searches was far less than that supporting blanket searches at airports and courthouses.

Of course, it is correct that the type of harm presented here is different in scope from that justifying searches at airports and courthouses, but so is the scope of the search undertaken. I do not suggest that the danger faced by Spartanburg would warrant checkpoint searches at all motorcycle rallies nationwide or at all large public events conducted in Spartanburg. More importantly, in assessing the reasonableness of a search made not for law enforcement purposes, but for a special need, the Supreme Court has never suggested that a harm must be perceived to be nationwide in scope. Instead, the Court has made plain that no "minimum quantum of governmental concern" is required to justify a special needs search and that the level of interest must be "important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Vernonia Sch. Dist. 47J*, 515 U.S. at 661 (emphasis omitted). Indeed, the Court has upheld the reasonableness of special needs searches when only local dangers were presented. *See id.* 648-50, 660-65 (holding that a drug problem among student athletes in a small school district was a sufficiently compelling special need to justify a random drug testing program for the student athletes without a warrant or individualized suspicion); *see also Wilkinson v. Forst*, 832 F.2d 1330, 1337-38, 1340 (2d Cir. 1987) (concluding that "when an organization with a ... demonstrable penchant for violence plans a rally which is to be attended by opposition groups who have historically clashed," and when violence is anticipated, the need for a limited blanket search is adequate to support such a search without individualized suspicion).

Plaintiffs also suggest that a special needs search is not reasonable unless the public interest supplying the basis for the search has been

identified and approved by a legislative or administrative body rather than perceived by law enforcement officers. *See, e.g., Edwards*, 498 F.2d at 498-500 (upholding airport searches conducted pursuant to federal regulations); *Downing*, 454 F.2d at 1232-33 (concluding that courthouse searches undertaken pursuant to federal regulations do not violate the Fourth Amendment). But, the Supreme Court has never intimated that a special needs search cannot be reasonable in the absence of legislative or administrative approval. Moreover, a rule that a special need cannot support a search unless the potential harm justifying the search has been identified in public records would be artificial and unworkable. Undoubtedly, a warrantless search designed to avert great harm that may be avoided only by an extremely limited and unintrusive type of search applied in a very evenhanded manner is not unreasonable simply because it is not authorized by a legislative or regulatory scheme. Rather, the genuineness and substantiality of the need for the search must be evaluated on a case-by-case basis. *See Chandler*, 520 U.S. at 318-19 (looking to the record for evidence of a concrete danger to support drug testing of candidates for state office); *Von Raab*, 489 U.S. at 668-71 (discussing the unique circumstances faced by employees of the United States Customs Service who are involved in drug interdiction or who must carry firearms).

For example, suppose law enforcement officials received reliable information that two individuals were transporting a large quantity of explosives by vehicle into a designated city by a specified route in order to blow up a museum where a popular, but controversial, exhibit was on public display. Obviously, under these facts, an enormous danger to public safety would exist that could be averted only by intercepting the would-be bombers. The Constitution would permit law enforcement officers to stop all motorists traveling into the area on the identified route and conduct cursory searches of the interiors and trunks of the vehicles because the severity of the harm, the effectiveness of the proposed response, and the minimal intrusion to the individuals subjected to a search weigh in favor of that conclusion.

Similarly, under the circumstances presented here, a special governmental interest existed in protecting the public. Spartanburg possessed concrete information that armed, rival motorcycle gangs, the members of which could not be identified, planned to attend the rally. And, the potential for the eruption of violence appeared real in light

of past altercations between the two groups. Given the large number of participants expected for the rally and the potential for a massive, violent confrontation, Spartanburg clearly possessed a genuine and substantial need to safeguard the public.

B.

The second factor, the effectiveness of the search, focuses on "the degree to which [it] advances the public interest." *Sitz*, 496 U.S. at 453 (internal quotation marks omitted). *Compare Chandler*, 520 U.S. at 319 (noting that "Georgia's certification requirement [was] not well designed to identify candidates who violate antidrug laws" because the testing date was known in advance so that abusers could refrain from using drugs prior to the test), *with Vernonia Sch. Dist. 47J*, 515 U.S. at 663 (explaining that random drug testing of student athletes was an effective means of addressing a drug abuse problem in the student body as a whole because the problem resulted at least in part from students' imitation of the student athletes' drug use). In analyzing this factor, however, our review must leave "the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger" to "the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz*, 496 U.S. at 453-54.

There can be little question that searching Plaintiffs' motorcycle saddlebags and unworn clothing was an effective means of preventing the type of weapons motorcycle gang members purportedly were carrying from finding their way into the public fairgrounds. Indeed, no less intrusive law enforcement effort would have worked as well. Because the magnetometers the officers first attempted to employ in order to avoid individualized searches were ineffectual, an effective method of search less intrusive than the one eventually employed was not possible. And, without the checkpoint search, Spartanburg would not have obtained individualized suspicion that specified persons possessed weapons until the gang members already had entered the fairgrounds, become a part of the large crowd, and brandished or used their weapons. By that time, the threat of a violent confrontation would have been fully realized. *See Davis*, 482 F.2d at 910 (noting in support of conclusion that airport searches are constitutional that

"[l]ittle can be done to balk the malefactor after [weapons or explosives are] successfully smuggled aboard[a commercial aircraft], and as yet there is no foolproof method of confining the search to the few who are potential hijackers"). The presence of a large law enforcement contingency to quell a disturbance after one had begun would not have been an effective means of preventing the tumult once weapons had been introduced to the rally.

Furthermore, the fact that individuals were permitted to walk into the fairgrounds without being searched provided that they parked their motorcycles outside the fairgrounds does not mean that the search method employed was ineffective.[5] The information available to Spartanburg indicated that motorcycle gang members frequently carried weapons in their motorcycle saddlebags. Thus, it was reasonable for Spartanburg to conclude that the likelihood of the transportation of weapons into the fairgrounds was less for individuals who parked their motorcycles outside and walked to the rally. And, it is important to realize that these weapons could not have been concealed easily in the tight t-shirts and blue jeans—or less—worn by the majority of the bikers on that very hot September afternoon. Additionally, Spartanburg reasonably could have concluded that individuals riding motorcycles into the fairgrounds would be more likely to convey weapons into the rally than those lacking a ready means of escape. Further, even if reasonable law enforcement officials could have concluded that a search of the individuals entering the fairgrounds on foot as well as those entering on motorcycle would have been more thorough, it is not within our province to question the decisions of officials concerning a choice of law enforcement techniques among reasonable alternatives.

C.

Finally, the degree of intrusion, both objective and subjective, suffered by individuals submitting to the search was minimal. The objective intrusion suffered by an individual is "measured by the duration of the seizure and the intensity of the investigation." *Sitz*, 496 U.S. at

[5]It is worth noting that Cook was stationed outside the pedestrian entrance gate to attempt to identify any notorious gang members entering on foot.

452. The subjective level of intrusion measures how the method chosen minimizes or enhances fear and surprise on the part of those searched or detained. *See id.*

Here, the intrusion experienced by Plaintiffs was slight. The searches were very brief and evenhanded, and the searching officers evinced the utmost respect for Plaintiffs. Furthermore, the intrusiveness of the search was lessened by the fact that the entrants to the fairgrounds were informed that they would be subjected to the search only if they wished to enter on motorcycle and would be permitted to enter without a search if they chose to park their motorcycles and enter as pedestrians. Also, all of those who entered the fairgrounds on motorcycles with saddlebags and unworn clothing were subjected to the search; the decision to search was not left to the discretion of the officers. *See id.* 452-53 (explaining that a checkpoint search where all entrants are searched is considerably less intrusive than a search by roving patrols that exercise discretion over whom to stop and search); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 565-66 (1976) (concluding "that the visible manifestations of the field officers' authority at a checkpoint provide substantially the same assurances" that investigators are acting lawfully as does a warrant and that the need for a warrant to accomplish the warrant requirement's purpose of substituting the judgment of a detached neutral decisionmaker for that of officers in the field is reduced when the field officers' discretion is subordinated "to the administrative decisions of higher ranking officials"); *Turner v. Dammon*, 848 F.2d 440, 446-47 (4th Cir. 1988) (explaining that "[t]he cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches"). Accordingly, the searches were minimally intrusive.

D.

In sum, a genuine and substantial threat to public safety existed that created a special need beyond that of the traditional law enforcement goals of apprehension and detection of criminal conduct; the method chosen to address that need effectively advanced the public interest, which could not have been promoted as well by a scheme requiring individualized suspicion or a warrant; and the intrusion suffered by those individuals who submitted to the search was minimal. There-

fore, a balancing of these factors clearly demonstrates that the search conducted was reasonable and thus not violative of the Fourth Amendment.[6]

III. Qualified Immunity

While I have no doubt that the search was within constitutional bounds, I do recognize that there is no precedent directly on all fours with these facts and therefore at least an argument can be constructed

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[6]The decision of the Supreme Court in *United States v. Ortiz*, 422 U.S. 891 (1975), and the decision of this court in *United States v. Gallagher*, 557 F.2d 1041 (4th Cir. 1977) (per curiam), are not to the contrary. In *Ortiz*, in addressing whether a checkpoint search of vehicles for illegal aliens that was not conducted at the border or its functional equivalent was constitutional, the Supreme Court remarked that "at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." *Ortiz*, 422 U.S. at 896-97. In *Gallagher*, we echoed this concern stating:

> [There is a] long-recognized distinction between border searches and those taking place in interior locations. "Travellers may be ... stopped in crossing an international boundary because of national self protection ...." *Carroll v. United States*, 267 U.S. 132, 154 (1925). "[S]earches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). At points other than the border or its functional equivalent, however, officers may not search private vehicles absent consent or probable cause.

Gallagher, 557 F.2d at 1043 (parallel citations omitted) (second & fourth alterations in original).

Despite their broad language, *Ortiz* and *Gallagher* can be distinguished. First, *Ortiz* did not apply the *Sitz* balancing test, and an application of that test to the facts presented in *Ortiz* leads to the conclusion that the searches at issue there were violative of the Constitution. More importantly, *Ortiz* confronted a search justified by illegal immigration and thus does not control when other justifications are offered in support of a search. In *Gallagher*, this court made clear that the search at issue was a border search, so statements by the court concerning searches conducted away from the border were mere dictum.

to the contrary. However, it strains all reason for one to conclude that Chief Bain is not entitled to qualified immunity.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only "for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992) (explaining that "[t]he fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless 'clearly established' for qualified immunity purposes" and that "'[c]learly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked"). As we recently reiterated, the law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state in which the action arose. *See Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998) (en banc).

In analyzing an appeal from the rejection of a qualified immunity defense, the first task of the court is to identify the specific right that the plaintiff asserts was infringed by the challenged conduct. *See Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). The court then must consider whether, at the time of the claimed violation, that right was clearly established and "'whether a reasonable person in the official's position would have known that his conduct would violate that right.'" *Id.* (quoting *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992)). Review by this court of the denial of summary judgment

based on qualified immunity is de novo. *See Pritchett*, 973 F.2d at 313.

The constitutional right that Plaintiffs claim was violated, defined at the appropriate level of specificity, is their Fourth Amendment right to avoid individualized searches of their motorcycle saddlebags and unworn clothing performed prior to entering the rally for the purpose of detecting weapons when reliable information indicated that a real and imminent danger existed that armed members of warring motorcycle gangs planned to attend the rally and when Plaintiffs were informed that they would not be searched unless they chose to enter the fairgrounds on their motorcycles. The qualified immunity question presented, then, is whether in September 1994 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it.

By September 1994, the Supreme Court had announced that the balancing test discussed above was the appropriate one to assess the reasonableness of a search conducted for a special need unrelated to law enforcement and without individualized suspicion or a warrant. *See Sitz*, 496 U.S. at 449-50. But, it is undisputed that when this incident took place there was no clear law from the Supreme Court, this court, or the South Carolina Supreme Court holding that a search fails to pass constitutional muster under the Fourth Amendment as a special needs search when officers conduct a search at a checkpoint—without individualized suspicion or a warrant—and a grave matter of public interest is at stake, an effective means of preventing that harm is available, and the searching technique employed is relatively unintrusive. *Cf. Wilkinson*, 832 F.2d at 1342 (holding officers were entitled to qualified immunity on similar facts because law not clearly established). Absent controlling authority indicating that a search conducted under these circumstances would be violative of the Fourth Amendment, a reasonable law enforcement officer may well have concluded that this type of search was constitutional. *See Gruenke v. Seip*, No. 97-5454, 1998 WL 734700, at *8 (E.D. Pa. Oct. 21, 1998) (holding that a high school swimming coach was entitled to qualified immunity in an action alleging that he violated a student's Fourth Amendment rights by forcing her to take a pregnancy test because the application of the special needs balancing test to the facts presented was not clearly established in 1997).

Moreover, prior to September 1994, this circuit had expressly held that one who submits to a checkpoint search in order to gain entry into an area after having been informed of the right to leave impliedly consents to the search. *See United States v. Haynie*, 637 F.2d 227, 230-31 (4th Cir. 1980); *United States v. DeAngelo*, 584 F.2d 46, 47-48 (4th Cir. 1978). In *DeAngelo*, this court upheld the constitutionality of a search conducted of passengers entering a boarding area at an airport as a valid consent search. *See DeAngelo*, 584 F.2d at 47-48. The court focused on the facts that a sign informed passengers that they would be searched if they entered and that nothing forced the passengers to enter. *See id.* Here, it is undisputed that those seeking entry into the fairgrounds were informed that they need not be searched and that they could enter the fairgrounds without submitting to a search by parking their motorcycles and walking into the rally. Accordingly, a reasonable officer in September 1994 could—indeed, would—have believed that those entering the fairgrounds impliedly consented to the search.

A reasonable law enforcement officer could not have known in September 1994 that Plaintiffs' Fourth Amendment rights would be violated by a search of their motorcycle saddlebags and unworn clothing as they entered the rally after being informed that they would not be searched unless they chose to enter the fairgrounds on their motorcycles. Therefore, Chief Bain is entitled to qualified immunity.

IV. Damages

Generally, when a court determines that a defendant has no liability, the court need not reach any questions of damages. *See, e.g., DeCarlo v. Fry*, 141 F.3d 56, 62 (2d Cir. 1998); *Berry v. Battey*, 666 F.2d 1183, 1187 (8th Cir. 1981); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 425 (6th Cir. 1980); *cf. Bazemore v. Friday*, 478 U.S. 385, 387 n.2 (1986) (per curiam) (stating that in light of the determination that defendants had no liability, question of whether lower court properly refused to certify a plaintiff class was moot). Here, however, the vote of the fourteen judges sitting en banc was evenly divided, and therefore, the holding of the district court that the search of the motorcycle saddlebags and unworn clothing was unconstitutional is affirmed. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *Supermarket of Marlinton, Inc. v.*

Meadow Gold Dairies, Inc., 71 F.3d 119, 126 (4th Cir. 1995). Consequently, the damages issues continue to present a live controversy for decision that I believe we are compelled to address.[7] *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (explaining that federal courts have "the virtually unflagging obligation ... to exercise the jurisdiction given them"); *Spann v. Martin*, 963 F.2d 663, 673 (4th Cir. 1992) (noting that a "court has a duty to decide cases within its jurisdiction"). Thus, despite my conclusion that Spartanburg committed no constitutional violation, I am not free at this juncture to refuse to address the damages issues or to resolve those issues in a legally incorrect way in order to reach a result consistent with my belief that no liability should have attached. Rather, I must accept that the underlying issues of liability have been established contrary to the way that I believe to be correct and resolve the damages issues accordingly. *See Arizona v. Fulminante*, 499 U.S. 279, 295 (1991).

Therefore, the damages questions presented are whether the district court erred in failing to award compensatory, punitive, or nominal damages given that a constitutional violation has been held to have occurred. For the reasons set forth in the panel opinion, I would affirm the decision of the district court holding that Plaintiffs failed to present adequate evidence to support an award of compensatory or punitive damages. *See Norwood v. Bain*, 143 F.3d 843, 855-56 & n.11 (4th Cir. 1998). And, I would reverse the decision of the district court that Plaintiffs are not entitled to nominal damages. *See id.* at 856; *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1256 (4th Cir. 1996).

V. Conclusion

In sum, I would hold that the search of Plaintiffs' motorcycle saddlebags and unworn clothing did not violate the Fourth Amendment. Additionally, I would hold that Chief Bain is entitled to qualified

[7]As a concurring and dissenting member of the panel, *see Norwood v. Bain*, 143 F.3d 843, 859 (4th Cir. 1998) (Wilkins, J., concurring in part and dissenting in part), I was not compelled to address separately the damages issues because all of the live controversies presented to the court had been resolved by the majority.

immunity. A contrary conclusion imposes an alarming restraint on efforts by law enforcement officials to protect public safety.

Judge Williams and Judge Traxler join in this separate opinion in its entirety; Judge Niemeyer joins in Parts I, II, and III of this opinion.

NIEMEYER, Circuit Judge, writing separately:

For the reasons given in Part II of Judge Wilkins' separate opinion, I conclude that the searches in this case do not violate the Fourth and Fourteenth Amendments. Moreover, I firmly believe, for the reasons given in Part III of Judge Wilkins' opinion, that W.C. Bain, Jr. cannot in any event be personally liable. Against the then existing state of law, I do not understand how we could rationally conclude that Bain was either "plainly incompetent" or that he "knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). His decision to conduct the searches was made in good faith against the gray background of administrative-search jurisprudence for the safety of the community, and we have previously noted that "bad guesses in gray areas" do not subject law enforcement officers to personal liability. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). In this case, I do not believe that Bain even made a bad guess, even though to guess was his only option.

Because of my position on liability, I conclude that no award of damages is appropriate in this case.

For these reasons, I would affirm the district court's conclusion that temporary stops and their videotaping was lawful; I would reverse the district court's conclusion that the physical searches of motorcycle bags were unlawful; and I would affirm its refusal to award any damages.

Chief Judge Wilkinson, Judge Widener, and Judge Luttig have authorized me to report that they join in this opinion.

(3)

Supreme Court, U.S.
FILED

98 1777 APR 8 1999

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOSEPH H. NORWOOD, individually and as representative of a class of citizens;

Respondent,

v.

W.C. BAIN, JR. individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; and CITY OF SPARTANBURG,

Petitioners.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

David L. Morrison - Counsel of Record
William H. Davidson, II
Andrew F. Lindemann
DAVIDSON, MORRISON AND LINDEMANN, P.A.
1712 St. Julian Place, First Floor
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR PETITIONERS

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Order of the Hon. G. Ross Anderson, Jr., United States District Judge, filed July 16, 1996. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Joseph H. Norwood, individually and as a Representative of a class of Citizens,	)	Civil Action No. 7:95-1016-3
Plaintiff,	)	
v.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
W.C. Bain, Jr., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department and the City of Spartanburg,	)	
Defendants.	)	

The Plaintiff and the class members he represents were involved in a Red Cross fund raising motorcycle rally held on September 11, 1994. Plaintiffs brought suit alleging that their Fourth Amendment rights were violated due to the alleged search, seizure, videotaping, and license check conducted by the Defendants as the class members entered the Piedmont Interstate Fairgrounds. The Plaintiffs also alleged that their First Amendment rights to associate were violated by the Defendants' actions.

During the week of May 20, 1996, this matter was presented to a jury. After fourteen hours of deliberation, the jurors were hopelessly deadlocked. Both sides have agreed to waive their rights to another jury trial. This Court, based on the express stipulation of the parties, now decides the action.

During trial, the Court directed verdict against Plaintiffs on their First Amendment claims. This Court also directed verdict against Plaintiffs on their claims for punitive damages. Those rulings stand. This Court now announces its findings of fact and conclusions of law regarding the remaining claims.

FINDINGS OF FACT

1. The Spartanburg Police Department (hereinafter the "Department"), headed by W.C. Bain, Jr., (hereinafter "Bain"), became involved in the Red Cross Poker Run (hereinafter "Rally") in May, 1994, when the Department was contacted to assist in providing security at the Piedmont Interstate Fairgrounds (hereinafter "Fairgrounds"). The Department was asked by rally organizers to provide off-duty officers.

2. John Poole, one of the co-chairs of the event, approached Captain Doug Horton of the Department sometime after the

initial request for assistance at the Rally and advised Horton to check on an individual named James "Oats" Oatfield, who was a reputed member of the Hell's Angels and A.B.A.T.E., which stands for "A Brotherhood Against Totalitarian Enactments". Poole also asked Horton to check on an outlaw biker group known as the Pagans.

3. Horton then approached a reserve officer of the Department, Carl McKinney, who reported that he had information that there was going to be a confrontation between rival biker gangs at the Rally. McKinney told Horton that his friend had been involved in a biker gang and was concerned for McKinney's safety. This friend also told McKinney that some of the persons involved were called "Penguin Poppers". McKinney testified that his friend asked to remain anonymous, as McKinney's friend was also concerned for his safety. McKinney further testified that his friend indicated that the biker gangs would be unidentifiable at the Rally because the members were going to "drop their colors". To "drop colors" means to conceal one's gang affiliation. "Colors" are the emblems and mode of dress that identify

certain members of biker gangs. The "colors" of a gang member are considered sacred by members of the gang.

4. Horton contacted Lennie Hicks at the South Carolina Criminal Justice Academy. Hicks had taught a course on outlaw biker gangs to officers at the academy. Hicks no longer taught the course on outlaw biker gangs and referred Horton to Lt. Ron Cook of SLED. Cook was the law enforcement expert on intelligence relating to biker gangs. Horton called Cook and described the information he had.

5. Cook informed Horton that James "Oats" Oatfield is one of the oldest living Hell's Angels in the country and was the state coordinator of ABATE. Cook also explained that the term "Penguin" is a derogatory term for Pagans used by the Hell's Angels. Cook further stated that the Hell's Angels and the Pagans were in turf battles over South Carolina. Based on these turf battles, the Hell's Angels and the Pagans enjoy tremendous animosity toward each other. Cook further told Horton that the term "Penguin Popper" is a designation of a rival biker gang whose aim is to cause harm to or death of a Pagan. The term "Penguin Popper" was not a commonly known term, thus lending some credibility to the reports

Horton related. Cook added that a clash between the Pagans and the Hell's Angels could be a very volatile situation. According to Cook, there were a number of motorcycle gangs located throughout South Carolina and including the Spartanburg area. Members of these gangs were reported to be "Penguin Poppers" in order to become full color-wearing members of the Hell's Angels.

6. Cook further informed Horton that there had been a fight between Hell's Angels and Pagans in Myrtle beach in May, 1994. During this fight, several gang members were hospitalized and the Hell's Angels had stripped a Pagan of his colors and shredded them. After this fight, during negotiations by SLED for the return of the colors, a Pagan leader warned law enforcement that there would be retribution against the Hell's Angels.

7. Cook also related to Horton that in the summer of 1994, the Hell's Angels and Pagans had another fight during a charity poker run similar to the Rally. Cook stated that this fight also ended in injury.

8. After speaking with Cook, Horton verified that there were active biker gangs in the Spartanburg area. The Spartanburg

Sheriff's Department reported that many of these groups were under surveillance and asked Horton to forward any information Horton had on these gangs.

9. In early August, 1994, Horton informed Bain for the first time about the Rally scheduled to end at the Fairgrounds and the potential for violent confrontation. Bain was also informed of that a beer permit had been issued for the Rally. Bain was noticeably upset by these revelations. Bain then set a meeting to be held on August 24, 1994 to discuss public safety at the Rally.

10. On August 16, 1994 Poole and other members of the Rally planning committee met with Horton at City Hall. At this time, the committee expressed concern for safety to Horton.

11. On the morning of August 24, 1994, Bain met with Cook and Horton to discuss any new information on biker gangs. Bain then held the meeting for everyone involved in planning the Rally. At this meeting, Bain informed everyone that he and his Department would be responsible for the security. Bain also asked for an update regarding the plans for the Rally. Poole updated the attendees on the status of the Rally.

12. Cook explained to the attendees the information he had regrading the Rally and biker gangs in general. Cook then asked everyone if they had had any contact with any known member of any outlaw biker gang. No one indicated that there was any contact with any outlaw bikers. After the general meeting recessed, however, Poole sought out Horton and Cook and advised those officers that Poole had spoken with James "Oats" Oatfield. Poole related that Oatfield was very interested in the Rally, and would not comment on the Hell's Angels plans regarding the Rally. Poole did not reveal this information in the general meeting, but waited until later because he was concerned that one of the members of the planning committee was a leader of ABATE.

13. Bain then organized a training session for his officers on biker gangs. Officers were informed about biker gangs and their violent propensity.

14. Cook also informed Bain that the most effective preventative measure against biker gang violence was a strong show of force. Based on this information, Bain began arranging for officers to work the Rally. Available officers were told that

they would receive their assignments on the morning of the Rally.

15. In late August or early September, 1994, Cook learned from the Virginia State Police that the Pagans had ordered a mandatory for Saturday, September 10, 1994, the day before the Rally. A "mandatory run" is an order from a leader of a biker gang for the members to ride to a certain location. The destination is not disclosed prior to the run in order to avert unwanted surveillance. There was no direct evidence that the destination of any mandatory run was Spartanburg.

16. Cook learned that a large crowd, including Hell's Angels, were supposed to be going to a Cherokee bike rally and would return by way of the Rally on Sunday. Cook relayed this information to Horton by fax on September 6, 1994. Horton and Cook kept in daily contact during this time.

17. On the night before the Rally, Poole told Horton that the Rally organizers expected as many as 3,000 to 4,000 bikers from Cherokee to converge at the Rally. Poole expressed his concern for adequate Rally safety.

18. Based on the information of his officers and Cook, Bain assigned 75 officers to work the Rally, In addition, Bain

requested, and received approval for, use of the SLED helicopter.

19. On the day of the Rally, Bain assigned his offers to their posts and disclosed the procedure he required. Bain instructed his officers to set up a check point at the "cattle gate" to the Fairground. Officers were instructed to let anyone walk through the gates. Those on motorcycles, however, were to be stopped, have their licenses examined, their licenses and persons videotaped, and their saddle bags and unworn clothing inspected for weapons. Bain's proffered reasons for the actions were to make a video record in case of trouble. Similarly, Bain positioned an officer atop the grandstand with a video camera. This officer was instructed to only video tape the crowd if trouble started.

20. Bain instructed his officers to scan the bikers' possession for weapons using a hand held metal detector. Not surprisingly, the metal detectors were ineffective due to the metal in the motorcycle.

21. The checkpoint was setup at the end of Bishop Street leading into the Fairgrounds and was, by all accounts visible for some distance. Participants were told that they could enter the

Fairgrounds without passing through the checkpoint if the participant parked their motorcycle in the parking lot. The officers followed Bain's instructions regarding the checkpoint, videotaping, and searching. That is, there was a checkpoint established, Plaintiffs were stopped, asked for identification, and videotaped. Some of Plaintiffs' saddle bags and unworn clothing was searched.

22. Cook was stationed at the cattle gate in order to see if he could recognize any biker gang members.

23. Bain's decision was based on the information he received from various sources as well as a legitimate concern for the safety of the Rally participants.

24. Bain was acting as a policy making official of the City of Spartanburg, and therefore, his actions were those of the City.

25. The officers involved in the searching and videotaping procedures were at all times acting under color of state law.

26. Bain and his officers had no information respecting any individual Plaintiff who passed through he checkpoint indicating that that individual was armed or engaged in any unlawful conduct.

27. Bain made no attempt to get a warrant before implementing the checkpoint, search, and videotaping procedure.

CONCLUSIONS OF LAW

Plaintiffs alleged that the action of the Defendants constituted unlawful searches and seizures. Specifically, Plaintiffs alleged that causing Plaintiffs to pass through a checkpoint, searching Plaintiffs' belongings, and videotaping Plaintiffs' persons and drivers' licenses constituted unlawful searches and seizures. Each will be discussed below.

I. Checkpoint

The first step in Fourth Amendment analysis is to determine if there has been a search or a seizure. A search is the seeking out that which is otherwise concealed from view. A seizure of a person whenever the police act so to cause a reasonable person to feel that they were not free to leave. Terry v. Ohio, 392 U.S. 1 (1968). Similarly, a seizure occurs when a vehicle is stopped at a checkpoint. Michigan Department of State Police v. Sitz, 110 S.Ct. 2481 (1990).

Based on the facts presented, the Department seized the Plaintiffs. Simply because the government seized Plaintiffs does not mandate finding for the Plaintiffs. A seizure is lawful if it is reasonable. U.S. Const. amend. IV. Certainly, a warrantless search

or seizure is presumptively unreasonable. This, the burden is on Bain to show that the seizure under these facts was reasonable. Bain has met his burden.

In order for the checkpoint to pass constitutional scrutiny, the state must have a legitimate interest, the checkpoint must promote that state interest advanced, and the checkpoint must be minimally intrusive. U.S. v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989). The ultimate issue of reasonableness is one of balancing the extent to which the seizure intrudes upon individual liberty against the advancement and importance of a state interest. Id.

The legitimate state interest sought to be advanced by Bain was to provide for the public safety of those citizens attending the event at the Fairgrounds by taking steps to minimize the possibility of a violent confrontation between rival outlaw motorcycle gangs.

The checkpoints, given the totality of the circumstances, were minimally intrusive. The checkpoints were clearly visible and the motorcyclists could avoid any questioning by parking their motorcycles and walking into the Fairgrounds. Similarly, pursuant to U.S. v. Oritz, 95 S.Ct. 2585 (1975), the checkpoints minimized any fear and annoyance because all present could see exactly what was occurring in front of them. All who wanted to ride their motorcycles

into the Fairgrounds were stopped. Thus, there was not impermissible singling out of any particular person.

Last, the checkpoint procedure was methodical and systematic in that the identification process was orderly and uniform; there were no more than two definite checkpoint lines; individuals were detained as briefly as possible; and officers were courteous and professional throughout. Accordingly, based on the specific facts here, the checkpoint was lawful.

2. Driver's License Check

As an adjunct to a legitimate traffic checkpoint, police may request an operator's permit for a motor vehicle. In this case, the police requested identification from the motorcyclists pursuant to the legitimate traffic checkpoint. Accordingly, the requesting of identification was lawful.

3. Videotaping

The first element of a search and seizure claim is that there must be a search or seizure. Plaintiff asserts that the videotaping of Plaintiff was an illegal search and seizure of the Plaintiff's identity. There was evidence that Bain videotaped the checkpoint procedures and information from the biker's licenses. There was no evidence of any other videotaping, even though a video camera was stationed on

top of the grandstand in the Fairgrounds. Thus, the only videotaping at issue here was adjunct to the checkpoint.

There can be no search of that which does not have a reasonable expectation of privacy. Those things exposed to public view do not have a reasonable expectation of privacy. See, Katz v. U.S., 389 U.S. 347 (1967). Thus, videotaping in public does not give rise to a cause of action when that videotape is not used for commercial purposes. There simply was no unlawful search or seizure regarding any videotaping activities of Bain.

4. Search of Plaintiff's Closed Containers and Personal Items

In addition to the checkpoint and videotaping, Bain also searched the closed containers and personal items of Plaintiffs. A warrantless search of a vehicle may be valid if based upon probable cause. California v. Acevedo, 500 U.S. 565 (1991). The requirement of probable cause exists even if the search occurs pursuant to a constitutionally valid check point. U.S. v. Oritz, 95 S.Ct. 2585 (1975). The same standard of probable cause would apply to the searches of containers and persons at a roadblock.

There is no dispute that these searches were without a warrant and without individualized probable cause. Even if a search is not accompanied by probable cause or a warrant, consent of the person

searched may make the search lawful. The consent of the person searched must be decided by looking at the totality of circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This Court has considered all of the circumstances here presented including the video tape of the actions of Bain, the method by which Plaintiffs were presented to Bain, and the number of police officers around at the time.

This Court finds that the searches of Plaintiffs violated the Fourth Amendment.

5. Relief

In a 42 U.S.C. § 1983 claim, a prevailing Plaintiff is entitled to damages or an injunction against future violations. A prevailing Plaintiff is entitled to actual, special, punitive or nominal damages. This Court directed a verdict against Plaintiff on its punitive damages claim at trial. That ruling stands. Similarly, Plaintiffs have presented no credible evidence that they suffered any actual or special damages. Thus, the only issue is nominal damages.

While Plaintiffs prevailed, this Court awards NO nominal damages. Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985)("We conclude that once the issue is presented to the jury, it may decide to

award a zero sum or some other small amount as nominal damages." Id. at 338).

As to the injunction, Bain is no longer the Chief of the Spartanburg Department of Public Safety. Similarly, the particular facts presented here make a repeat of this situation highly unlikely. For these reasons, this Court does not issue an injunction.

CONCLUSION

This Court finds that the videotaping, requesting of identification and stopping of Plaintiffs at a checkpoint did not violate the Constitution. This Court finds that the searching of Plaintiffs' persons and belongings violated the Fourth Amendment. This Court finds that while Plaintiffs prevailed, they are entitled to zero nominal damages.

/s/ G. Ross Anderson, Jr.
G. Ross Anderson, Jr.
UNITED STATES DISTRICT JUDGE

Anderson, SC
July 16, 1996

No. 98-1777

Supreme Court, U.S.
FILED
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CLERK

In The Supreme Court of the United States

October Term 1998

W.C. BAIN, JR., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; CITY OF SPARTANBURG,

Petitioners,

v.

JOSEPH H. NORWOOD, individually and as representative of a class of citizens,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

W. Gaston Fairey
Counsel of Record
FAIREY, PARISE & MILLS, P.A.
Post Office Box 8443
Columbia, South Carolina 29202
(803) 252-7606

Counsel for Respondent

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

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STATEMENT OF THE CASE

Respondent, the class representative of a class of 74 citizens ("class"), submits the following reasons why the Petitioners' ("City") request for certiorari review should be denied.

The class submits that the City's Statement of the Case creates an inaccurate impression of the facts of this case. Judge Philips's factual recitation in the original panel decision more accurately reflects the events of his case. *See App.* at 14-18. Of particular note is the description of the searches provided in that opinion. *App.* at 16 n. 1. The City's version of the facts is simply not consistent with that found by the district court or of the prevailing decision of the court of appeals. The essential fact in this matter is that the City through its chief of police engaged in wholesale suspicionless searches of citizens without prior judicial notice or administrative consultation in a situation in which other law enforcement professionals strongly disagreed about the threat to public safety. *See App.* at 16 (regarding South Carolina Law Enforcement Division's decision not to participate in the entry search procedure or provide extra security due to the "large number of family groups and regular civilians at this function").

REASONS FOR DENYING THE WRIT

The City's arguments do not adequately explain why this case should be accepted for review. There is no split in the circuits on this issue, and other than citing to administrative search cases that involve substantially different principles, the City has cited no opinion of this Court that conflicts with the decision in this case. Petitioners' reliance upon the line of administrative search cases to support their arguments that the suspicionless searches were reasonable ignores the constitutional significance of the requirement of a "documented public record" of harm to support administrative search schemes.

While the reasonableness requirement is ordinarily fulfilled by a warrant or some level of individualized suspicion, the plaintiff class recognizes that these traditional requirements are not "an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Rabb*, 489 U.S. 656, 665 (1989). However, when dispensing with the traditional components, this Court has imposed or identified other objective constraints upon law enforcement to limit unfettered discretion. In the case of courthouse and airport searches, a well-documented history of terrorism and resulting nationwide regulations provide objective limits upon law enforcement's ability to search as well as the scope of the search. Thus, while the City may be correct that a public record of need is unworkable for some law enforcement challenges, other objective limitations such as administrative or statutory schemes, business regulations, or area warrants have been recognized as providing the constraints necessary in almost all cases in which individualized suspicion is not required. It is this requirement of independent constraint that the City ignores in its arguments.

Unquestionably, there are circumstances when the warrant\individualized suspicion requirements are not practical. Judge Wilkins' factual scenario of the vehicle with the bomb is a good example of such a circumstance. If public safety is seriously threatened by the time it would take to get independent judicial approval of a law enforcement procedure that would normally violate a citizen's constitutional rights, our system allows for immediate action. Our constitutional law has consistently recognized that *exigent* circumstances may relieve law enforcement from the warrant or individualized suspicion requirements. This is nothing new. So long as the official acts in good faith, their conduct is protected, even if, in hindsight, it is in error. The use of such analysis in this case is misplaced. There was no time constraint, and the search procedure was planned well in advance.

Except in actual exigent circumstances when time is of the essence, there must be some independent objective control to constrain law enforcement discretion. This is because the purpose of the Fourth Amendment is to protect citizens' privacy from "official arbitrariness," *United States v. Ortiz*, 422 U.S. 891, 895-96 (1975), and the "`unbridled discretion' of government officials." *Turner v. Dammon*, 848 F.2d 440, 446 (4th Cir. 1988). Yet in this case no alterative control has been proposed or suggested. The City's analysis does not factor this basic element into the equation even though all of the cases cited in support of the City's position rely upon this concept to provide the reasonableness component.

The decision in this case goes beyond whether to approve, in hindsight, the searches conducted at the cattle gate. The City's analysis seeks to establish a new exception in the "closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 117 S.Ct. 1295, 1298 (1997). It is suggested that the searches conducted in this case are constitutional because they fall under the category of "special governmental needs, beyond the normal needs of law enforcement." *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989). The class submits that this position expands "special needs" exception beyond its intended meaning and purpose. For example, this Court explained that exceptions to the warrant\individual suspicion requirement exist in areas in which "there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted." *Vernonia School Dist. 47J. v. Acton*, 115 S.Ct. 2386, 2390 (1995). However, application of that concept to this case demonstrates how inappropriate this case is for application of the exception. The potential dangers at public meetings and celebrations are not ones unfamiliar to law enforcement. When the Fourth Amendment was adopted, public functions were common. One may assume that similar weapons (hammers, metal wrenches and guns) were common, such weapons were

sometimes carried to public functions and, on occasion, law enforcement officials learned that trouble might occur at a planned event.

The specific danger sought to be remedied by the City in this case is simply not unfamiliar to law enforcement. To expand the meaning of "special needs" to include situations commonly faced by law enforcement officials contradicts this Court's careful confines in this area of exception. Unquestionably, an effective method of preventing weapons at a public gathering is to search each person's possessions. The same would surely apply to political and "issue" rallies. The potential dangers involved in these events are often substantial. Giving law enforcement the unfettered discretion to engage in mass searching procedures without prior authorization invites the exercise of the authority without the traditional safeguards that have ensured the reasonableness of governmental action. As a result our courts would no longer be considering exceptions based upon statutory authorization, but would be passing in hindsight upon the dangers involved in an infinite variety of factual scenarios.

Except in carefully limited situations as delineated in *Chandler*, we do not engage in wholesale searches because the risks are a part of the price our society has deemed acceptable to protect our individual constitutional liberties.

> It is not enough to argue, as does the Government, that the [public] problem ... is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsel a resolute loyalty to constitutional safeguards.

Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

The standard used by law enforcement to this point in time has been clear. Unless authorized by statute or regulation or in actual exigent circumstances, wholesale searches are not to be conducted. The class of citizens submits that the existing rule well serves society and law enforcement.

Chief Bain seeks review of the district court's denial of qualified immunity. The class submits that this issue is not one of significant importance, and the decision does not conflict with any existing case in this Court or create a split in the circuits.

CONCLUSION

For the foregoing reasons the plaintiff class requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted, this the 12th day of May, 1999.

FAIREY, PARISE & MILLS, P. A.

W. GASTON FAIREY
Counsel of Record
Post Office Box 8443
Columbia, South Carolina 29202
(803) 252-7606

COUNSEL FOR RESPONDENT